

Sivalls, Inc. and United Rubber, Cork, Linoleum & Plastic Workers of America, District 3, AFL-CIO, CLC. Cases 16-CA-14715, 16-CA-14715-2, 16-CA-14782, 16-CA-14821, and 16-CA-14949

June 30, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND OVIATT

On November 20, 1991, Administrative Law Judge Burton Litvack issued the attached decision. The Respondent and the General Counsel filed exceptions and supporting briefs, and the General Counsel also filed an answering brief to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs¹ and has decided to affirm the judge's rulings, findings,² and

¹ The Respondent excepted to the judge's findings (1) that it unlawfully reduced the wages of employee Frank Mendoza and (2) that it unlawfully failed and refused to bargain with the Union about the Respondent's decision to have employee drug tests performed by Harrison & Associates Forensic Laboratories. The General Counsel excepted to the judge's finding that the Respondent did not unlawfully transfer Mendoza to the painting and sandblasting department. There are no exceptions to the judge's findings and conclusions on any of the other unfair labor practice allegations, and none of the issues related to those other allegations are before the Board.

² The Respondent and the General Counsel have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The judge's decision contains some inadvertent errors, which we correct below. None of them affects our results.

In the third paragraph of sec. IV,A,4 of his decision, the judge found that there was "no" record evidence that the Respondent may have believed that Mendoza was one of the employee leaders of the Union's organizing campaign. The insertion of "no" here appears to have been inadvertent, in light of the rest of the judge's discussion in that paragraph and in the 10th and 11th paragraphs in sec. IV,B, in which he found that there was ample record evidence on which to base a conclusion that the Respondent believed that Mendoza was a leader of the organizing campaign and a principal union adherent in the plant.

In the last sentence of sec. IV,A,4, the judge erroneously found that the Respondent's plant manager, Ed Greenlee, testified that the two new hires in the painting and sandblasting department were paid the same wage rate as Mendoza—\$9 per hour. Greenlee testified that he believed that one of the new hires was paid \$7.50 per hour and the other \$8, but that it was not \$9 or \$10.

In the remedy section of his decision, the judge erroneously recommended that backpay to make Mendoza whole for lost wages resulting from the Respondent's unlawful reduction of his wage rate be computed as described in *F. W. Woolworth Co.*, 90 NLRB 289 (1950). Where, however, an employer's unlawful conduct results in a loss of earnings but not cessation of employment status itself, as

conclusions as modified and to adopt the recommended Order as modified.

1. We agree with the judge's conclusion that the Respondent violated Section 8(a)(1) and (3) of the Act by discriminatorily reducing Frank Mendoza's wage rate from \$10 to \$9 per hour when it permanently transferred him from the welding department to the painting and sandblasting department.

The Respondent's plant manager, Ed Greenlee, testified that at the time of Mendoza's transfer the Respondent had an established firm policy that when an employee is permanently transferred to a different department he cannot be paid at a higher wage rate than the highest paid employee in that department, and that Mendoza's wage rate was reduced in compliance with that policy. The judge discredited Greenlee's testimony on this subject as "an utter canard."

In affirming the judge's conclusion, we note particularly, in addition to his discrediting of Greenlee on this subject, his findings (1) that there was no discrete job classification or wage scale for a sandblaster (Mendoza's new principal duty), but (2) that the wage scale for a painter (Mendoza's new occasional duty) went up to \$11 per hour, and (3) that the determination of Mendoza's wage rate at the time of his transfer was solely within the Respondent's discretion—unrestricted by any such wage policy for permanent transfers as claimed by the Respondent.

2. We disagree with the judge's finding that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to provide the Union with advance notice and an opportunity to bargain about the Respondent's decision to use Harrison & Associates Forensic Laboratories (Harrison Laboratories) to conduct drug and alcohol testing of the Respondent's employees.

The judge found (1) that the selection of a particular drug/alcohol testing facility is a mandatory subject of bargaining, (2) that the Respondent's decision to use Harrison Laboratories to conduct testing was not made until after the August 10, 1990³ representation election in which the Union was selected to be the collective-bargaining representative of the Respondent's unit employees, and (3) that the Respondent therefore violated Section 8(a)(5) and (1) by failing to bargain with the Union about this decision.

For the reasons set forth below, we find, contrary to the judge, that the Respondent's decision to use Harrison Laboratories was reached before the representa-

in the instant case in regard to Mendoza's wage reduction, computation of remedial backpay under the *F. W. Woolworth* formula is not appropriate. *Ogle Protection Service*, 183 NLRB 682 (1970). See *Parma Industries*, 292 NLRB 90, 91 fn. 9 (1988) (discriminatory withholding of wage increase).

³ All dates are 1990 unless otherwise stated.

tion election, and thus before the Respondent incurred any bargaining obligation toward the Union.⁴

In October 1989, the Respondent's personnel manager, Ronnie Dunn, met with Harrison Laboratories' owner and president, Roy Harrison. They discussed the Respondent's plans for a drug testing program and Harrison Laboratories' capability and availability to conduct the testing for the Respondent. Harrison gave Dunn a Harrison Laboratories informational brochure, containing, inter alia, a description of various informational and testing services available, detailed checklists for implementing a drug program and for selecting a drug testing laboratory, and a price list for testing and other services. Later that month, Harrison Laboratories conducted a safety meeting on drug abuse for the Respondent's employees at the Respondent's premises.

The Respondent implemented a drug testing policy for employees on January 1 and announced it to the employees on May 1, with an effective date of August 1.⁵ The announced policy did not, however, specify a particular laboratory facility to perform the drug testing, and the Respondent did not identify one to the employees at the time of announcement. Harrison Laboratories first tested the Respondent's employees on August 22 (i.e., after the August 10 representation election).⁶

The Respondent's executive vice president, Attieson Halbrook, testified that the decision to use Harrison Laboratories to do the testing was made in late April (i.e., before the May 1 announcement of the plan to the employees), that Dunn notified Harrison of this decision at that time, and that Dunn told Harrison that the Respondent would get back in contact when the testing program actually went into effect on August 1.⁷

The record shows that Harrison Laboratories' business practice is not to enter into written contracts with the clients for whom it performs drug testing, and that it did not enter into a written contract with the Respondent. Harrison Laboratories performs drug testing for clients upon request, and bills them (including the Respondent) for services rendered on a monthly basis. In order to engage Harrison Laboratories' drug testing services, the Respondent only had to advise when and

where the Respondent wanted particular testing to be conducted.

The judge, however, found that although the Respondent informed Harrison in April that it would use his firm to perform the drug testing in question, "no contract between the parties existed for such purpose at that time."⁸ Halbrook testified:

We contacted Harrison's Labs in April and told them they were going to be the ones that was going to do our drug testing. We subsequently, *after the election*, contacted them and made arrangements for them to do the testing. [Emphasis added.]

Relying on this testimony, the judge found that the Respondent did not contact Harrison Laboratories to arrange for the initial August 22 testing until after the election. Under his analysis, the judge therefore found that the Respondent and Harrison Laboratories did not reach a *contract* for drug testing until after the election—at which point the Respondent had a bargaining obligation toward the Union.

Contrary to the judge, we find on the basis of the evidence set forth above that there was no "contract" here, oral or written, between the Respondent and Harrison Laboratories for the drug testing of the Respondent's employees. The record shows that it was Harrison Laboratories' established business practice not to enter into such contracts with its clients. Rather, we find that the Respondent and Harrison Laboratories arranged, without specifying a fixed period of time or number of tests, that from time to time as requested by the Respondent, Harrison Laboratories would conduct drug testing of the Respondent's employees, on dates subsequently to be provided by the Respondent, and that Harrison Laboratories would bill the Respondent monthly for those services.

In our view, the critical question in this case is when did the Respondent decide to use Harrison Laboratories for drug testing. On the basis of the preponderance of the evidence, as summarized above, we find that the Respondent, having consulted with and having been advised by Harrison Laboratories on drug testing matters since as early as October 1989, decided in April—well before the existence of a bargaining obligation to the Union—to have Harrison Laboratories conduct the drug testing of its employees under the Respondent's new plan. Thus, we find that at the time the Respondent decided to use Harrison Laboratories for drug testing it was not yet under an obligation to bargain with the Union. Accordingly, we shall dismiss this complaint allegation.

⁴ Accordingly, we find it unnecessary in this case to decide whether an employer's decision to use a particular drug/alcohol testing facility is a mandatory subject of bargaining, and whether the Respondent therefore would have had an obligation to bargain with the Union about the decision to use Harrison Laboratories if that decision had not been reached before the representation election.

⁵ The lawfulness of the Respondent's establishment and implementation of this drug testing policy, prior to the Union's victory in the August 10 representation election, is not at issue.

⁶ Testing was also conducted on August 23, 28, and 29, and in October.

⁷ Although the judge assessed Halbrook's credibility unfavorably in regard to his testimony on some other matters in this case, the judge made no comment as to Halbrook's credibility in his uncontradicted testimony on this matter.

⁸ The judge found that "the parties herein seem to agree that, at most, Dunn's conversation with Harrison in April constituted Respondent's acknowledgment of its intent to use Harrison & Associates Forensic Laboratories for the purpose of conducting drug tests of its employees."

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Sivalls, Inc., Odessa, Texas, its officers, agents, successors, and assigns, shall take the the action set forth in the Order as modified.

1. Delete paragraph 1(g) and reletter the subsequent paragraphs.
2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT engage in bad-faith surface bargaining with no intention of entering into any final or binding collective-bargaining agreement with United Rubber, Cork, Linoleum & Plastic Workers of America, District 3, AFL-CIO, CLC, the exclusive representative for purposes of collective bargaining of our production and maintenance employees at our Odessa, Texas plant.

WE WILL NOT refuse to consider the inclusion of a dues-checkoff provision in any final collective-bargaining agreement with the Union.

WE WILL NOT insist on a broad management-rights clause and a no-strike provision in any final collective-bargaining agreement with the Union while, at the same time, refusing to consider the inclusion of any arbitration provision.

WE WILL NOT refuse to engage in collective bargaining with the Union at our plant while, at the same time, refusing to share the cost of any meeting site away from the plant.

WE WILL NOT unreasonably delay in furnishing information, which is necessary and relevant for collective bargaining, to the Union.

WE WILL NOT unilaterally, and without giving prior notice to the Union or affording it an opportunity to bargain, implement changes in our bargaining unit employees' terms and conditions of employment, as set forth in a revised employee manual, including a new provision that the plant "will" be closed for 2 weeks for maintenance and requiring vacations be taken during the shutdown, a provision giving employees an hour of unauthorized leave in order to vote, and the deletion of the material dispatcher job classification.

WE WILL NOT unilaterally, without giving the Union prior notice or affording it an opportunity to bargain, and in retaliation for our bargaining unit employees' selection of the Union to represent them, change their terms and conditions of employment, including no longer permitting food and drink to be taken back to work stations after break periods and changing the time for the distribution of paychecks.

WE WILL NOT reduce our employees' rates of pay, after permanently transferring them to different jobs, in retaliation for their perceived leadership role in the Union's organizing campaign.

WE WILL NOT interrogate our employees regarding their union activities and sympathies and those of their fellow employees.

WE WILL NOT warn our employees that their organizing efforts and selection of the Union as their bargaining representative would be an exercise in futility.

WE WILL NOT threaten reprisals against our employees for their organizing efforts and selection of the Union as their bargaining representative.

WE WILL NOT warn our employees that, if they select the Union as their bargaining representative, contract bargaining will start from the ground up and could drag on for 15 to 17 years without any agreement.

WE WILL NOT threaten our employees with termination because of their support for the Union.

WE WILL NOT threaten our employees with plant closure, loss of benefits, or other reprisals if they select the Union as their bargaining representative.

WE WILL NOT solicit grievances or "gripes" from our employees in order to induce them to abandon their support for the Union.

WE WILL NOT threaten our employees with termination for discussing their rates of pay or salary with fellow employees.

WE WILL NOT create the impression that we are engaging in surveillance of our employees' protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL bargain in good faith with the Union regarding rates of pay, wages, hours, and other terms and conditions of employment and, if an agreement is reached, embody the terms of the agreement in a signed written agreement.

WE WILL restore the status quo terms and conditions of employment as they existed prior to our 1990 unilateral changes, which occurred after the Union's victory in a representation election, and continue them in effect unless and until the Union states its desire not to bargain over a change, a collective-bargaining agreement is reached with the Union, or an impasse is reached in bargaining.

WE WILL restore the rate of pay of employee Frank Mendoza to the rate at which he was paid at the time of his permanent transfer to the painting and sand-blasting department and WE WILL make him whole, with interest, for any wages he lost as a result of our discrimination against him.

SIVALLS, INC.

Timothy L. Watson, Esq., for the General Counsel.
James T. McNutt Jr., Esq. (Scott, Hulse, Marshall, Feuille, Finger & Thurmond), of El Paso, Texas, for the Respondent.
Freddie Sanchez, URW Representative, of Odessa, Texas, for the Charging Party.

DECISION

STATEMENT OF THE CASE

BURTON LITVACK, Administrative Law Judge. Based upon unfair practice charges in Cases 16-CA-14715, 16-CA-14715-2, 16-CA-14782, 16-CA-14821, and 16-CA-14949, filed by United Rubber, Cork, Linoleum & Plastic Workers of America, District 3, AFL-CIO, CLC, on August 13, October 18, November 21, December 6, 1990, and March 15, 1991, respectively, the Regional Director of Region 16 of the National Labor Relations Board (the Board) issued a consolidated complaint on April 22, 1991, alleging that Sivalls, Inc. (Respondent), had engaged in acts and conduct violative of Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act). Respondent timely filed an answer, essentially denying the commission of any of the alleged unfair labor practices. Pursuant to a notice of hearing, a trial on the merits of the consolidated complaint allegations was held before me in Odessa, Texas, on May 14 through 16, 1991.¹ At the hearing, all parties were afforded the opportunity to examine and/or cross-examine each witness, to offer into the record any relevant evidence, to argue legal positions orally, and to file posthearing briefs. The documents were filed by counsel for the General Counsel and by counsel for Respondent and each brief has been carefully considered. Accordingly, based upon the entire record herein, including the posthearing briefs and my observation of the testimonial demeanor of the several witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a State of Delaware corporation, maintains a plant and office facility in Odessa, Texas, at which it is engaged in the manufacture of oil and gas processing equipment. During the 12-month period immediately preceding the issuance of the consolidated complaint, which period is representative, in the normal course and conduct of its business operations, Respondent purchased and received, at its Odessa, Texas facility, goods, and materials, valued in excess of \$50,000, directly from suppliers located outside the State of

Texas. Respondent admits that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

Respondent admits that United Rubber, Cork, Linoleum & Plastic Workers of America, District 3, AFL-CIO, CLC (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

III. ISSUES

The consolidated complaint alleges that, prior to the holding of a representation election on August 10, 1990, Respondent engaged in numerous violations of Section 8(a)(1) of the Act, including interrogating employees about their union sympathies and activities, threatening employees with discharge and loss of benefits because of their union activities, expressing to employees the futility of unionism by various means, threatening to shut down the plant because of employees' union activities, and creating the impression of surveillance of employees' union activities. The consolidated complaint also alleges that Respondent engaged in conduct violative of Section 8(a)(1) and (3) of the Act on or about September 20, 1990, by demoting and reducing the pay of employee Frank Mendoza. The consolidated complaint further alleges that Respondent engaged in conduct violative of Section 8(a)(1), (3), and (5) of the Act by, subsequent to the holding of the aforementioned representation election, unilaterally changing its employment practices regarding distributing employee paychecks prior to the end of the workday and regarding the consumption of food and drink at the close of break periods. Finally, the consolidated complaint alleges that Respondent engaged in conduct violative of Section 8(a)(1) and (5) of the Act by failing and refusing to supply necessary and relevant information to the Union for the conduct of bargaining; by unilaterally contracting with an independent laboratory for the conducting of drug tests of its employees; by instituting several unilateral changes in the terms and conditions of employment of its employees, including instituting a new scheduling plan for vacations, discontinuing granting 1 hour paid voting time, abolishing the material dispatcher job classification, and implementing a policy requiring employees to return from vacation based upon Respondent's needs; by, during collective bargaining with the Union, refusing to meet at its own facility and refusing to share the cost of a neutral location, insisting upon an overly broad management-rights clause, insisting upon a no-strike provision but refusing to provide for arbitration of grievances, refusing to include a dues-checkoff provision, and by insisting upon inclusion of a broad waiver clause; and by engaging in overall surface and bad-faith bargaining. Respondent denied the commission of all of the alleged unfair labor practices.

IV. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

1. Background

Respondent is engaged in the manufacture of oil and natural gas processing equipment, in the form of large cylindrical-shaped vessels, used for the treatment of oil and gas as these materials are pumped from beneath the surface of

¹ At the hearing, counsel for the General Counsel was granted permission to amend the consolidated complaint to allege an additional violation of Sec. 8(a)(1) of the Act.

the earth and maintains production facilities in Odessa, Pampa, and Brownwood, Texas. The Odessa facility, at which the events herein occurred, is comprised of an office building, a manufacturing building, and a painting and sand-blasting "shed." Attieson Halbrook is Respondent's executive vice president; Ed Greenlee is the Odessa facility plant manager and "oversees" all work performed there; and Russell Cranson is the foreman of the welding department. During the summer months of 1990, Respondent employed approximately 50 production and maintenance workers at the Odessa plant, with, at least, a third of the employees working in the welding department. There is no dispute that the Union commenced an organizing campaign of Respondent's aforementioned employees in June 1990 and that, after Freddie Sanchez, a temporary international representative of the Union, met with a group of Respondent's employees, distributed literature, and asked them to execute authorization cards, a representation petition was filed with Region 16 of the Board on June 19. Likewise, there is no dispute that the representation election, encompassing Respondent's production and maintenance employees, was scheduled for August 10 and that the ensuing preelection period was characterized by partisan campaigning by both Respondent and the Union.

2. Respondent's allegedly unlawful preelection conduct

Insofar as the record reveals, whatever unlawful conduct in which Respondent may have engaged during the preelection period is attributed to two managerial employees, Ed Greenlee and Russell Cranson, who, Respondent admitted, are supervisors within the meaning of the Act. Initially, with regard to the Welding Supervisor Cranson, William Hudnall, who was employed by Respondent as a welder from June 1987 until being laid off on April 14, 1991, testified that, early in the preelection time period, Cranson approached him at his work area and, with no one else present, "he asked me how the union was going." Believing that Cranson wanted to learn what the employees desired from union representation, Hudnall replied that the employees were gathering all their proposals together for contract negotiations but were particularly concerned about better benefits and, perhaps, more money. Cranson responded that the Union could not guarantee more money to the employees and that "the company would spend the last dollar that they had to beat the union; that nothing was guaranteed." He added that there were cases that extended to 15 to 17 years and "they would never get a contract." On another occasion late in June, according to Hudnall, he and Cranson were discussing the Union at his work area, and Hudnall commented that "what we were trying to do is put ourselves together and that we could get better benefits and . . . more money. And he told me that there was no way that we could get that . . . and that . . . the company wouldn't abide by that." Cranson then warned "if I continued to talk to anyone about the union . . . I was going to be fired." The witness added that Cranson repeated this same warning "at least a dozen times" on a daily basis before the election. Hudnall testified about a third allegedly unlawful conversation with his supervisor 1 or 2 days before the election in Cranson's office. According to Hudnall, Cranson "said that the election was over at 4:00 and that if we won . . . everything that we had at the company—our benefits, our holidays, our vacations, our

breaks—everything would be taken away. . . . we had no guarantee of anything; it would be all negotiable."²

Ernest Munoz, a welder who worked for Respondent from June 1985 until his layoff on April 12, 1981, also testified to allegedly unlawful conversations with supervisor Cranson. The first of these occurred in early or mid-July when Munoz was in the supervisor's office examining blueprints. Cranson was in the office, and "he was telling me that the union was no good and what did I think about it." Munoz replied that he once had belonged to a union and that it was good.³ Next, the witness testified to a conversation similar to one described above between Cranson and Hudnall. According to Munoz, 2 weeks before the election, while in the supervisor's office examining blueprints, Cranson "told me that if the union won, they would take all benefits away, and just [because] they were bargaining didn't mean they would come to an agreement, and that there was a company that had been bargaining for 17 years and never came to anything."

Two other witnesses testified to allegedly unlawful conversations with Russell Cranson. Gregory Perez, who was employed by Respondent as a welder/fabricator until being terminated in August 1990 after failing a drug test, testified that, one afternoon in late June, while he was speaking to Cranson in front of the supervisor's office regarding his work assignment, Cranson mentioned one of Respondent's competitors RAMA and said that "this union thing is going to screw things up. . . . all you guys who are in the union . . . if you think you can get a job and not be fired from her and go the RAMA's . . . RAMA doesn't want you over there. . . . [Ronnie Dunn, the personnel director has] already let them know who all is in the union and . . . [RAMA] doesn't want you over there." Abel Cadena, who worked for Respondent for more than 5 years before being terminated for failing a drug test in October 1990, testified that he spoke to Cranson "about a week before the election" regarding the Union. Cadena, who was a welder, went to Cranson's office to get a job assignment, and, in the midst of their conversation, they discussed the Union and the possibility of better employee benefits. The supervisor said that the Company would do what it wanted, and "they weren't afraid of no union. . . . He told me, too, that the union would split the shop up." Cadena disagreed, saying the employees seemed closer than they had ever been. To this, Cranson replied, "That what is going to happen is it is going to shut the place down if the union comes in."

During his direct examination, Russell Cranson generally denied the consolidated complaint allegations regarding him and denied having initiated any conversations with employees about the Union. However, he admitted having many conversations with the employees, whom he supervised, on

² Hudnall insisted that Cranson initiated the three conversations, and "I would tell him that I did not want to talk about the union. We had several conversations where he would ask me questions and then he would get mad, and . . . cuss at me and tell me that damn union wasn't going to get you anything out there."

While Hudnall conceded that he wore a "vote yes" button, indicating support for the Union, there is no evidence as to when he did so or that his Supervisor Cranson was aware of his union sympathies.

³ According to Munoz, he had never given Cranson any indication as to his union sympathies and had never worn a union button or T-shirt.

that subject, and, as will become evident, his testimony as to these admitted conversations was at variance with his aforementioned general denials. Thus, while denying having expressed to employees the futility of organizing by stating that there were cases of companies dragging out contract negotiations for 15 to 17 years, Cranson admitted, during direct examination, that such discussions with Munoz and Hudnall might have occurred—"I believe so. I don't know for sure." Cranson continued, saying that he might have mentioned how long bargaining could last as the two employees had the "impression" that a contract could be reached after just one bargaining session. Moreover, during cross-examination, Cranson was able to recall a conversation with Hudnall, during which he said there was a company that had negotiated with a union for 15 to 17 years and dragged out negotiations to the point that the union was never able to achieve a collective-bargaining agreement, and conceded it was "possible" he also told this to Munoz. Further, the supervisor admitted that he "initiated" the bargaining story as he had heard about the matter from a relative and conceded that the point of his story was that the Union might not necessarily ever reach a contract with Respondent. With regard to warning Hudnall that he could be fired for speaking about the Union, Cranson admitted speaking to Hudnall about talking about the Union while working—"I told him that he needed to go back to work and quit talking about union on company time, or it could cost him his job. And he was headed back to his work station." According to the supervisor, he had previously explained to Hudnall that he could speak about the Union "on his own time, at break, at dinner, after work, before work, just not during working hours." Then, asked if he told Hudnall that he could not speak about the Union at his work station while working, Cranson replied, "No," but, immediately thereafter, answered "yes" when asked if he told Hudnall he could speak about the Union at any time he was not working. Regarding his attributed threat that Respondent would take away all employee benefits if the Union won the election, Cranson admitted that, 1 week before the election, he told employees that, if the Union won, Respondent could do anything—"It was their prerogative." Specifically, as to benefits being taken from them, Cranson conceded that employees "asked me what would happen. I don't know what would happen. . . . the company is running it." Also, he admitted that, with regard to bargaining, he told employees the parties did not have a contract "so they are going to have to start . . . from [the ground up]." Finally, while emphatically denying, during direct examination, that he ever threatened that Respondent would shut the plant if the employees selected the Union to represent them, Cranson changed his testimony during cross-examination, saying the issue was raised by employees prior to the election, "and I just answered they can do what they want."⁴

With regard to allegedly unlawful statements made by Plant Manager Greenlee, William Hudnall testified that, just prior to the election, Cranson asked him to report to the plant manager's office. He did so and, upon entering the office,

⁴With regard to other alleged statements attributed to him, Cranson denied interrogating any employee as to his union sentiments and could not recall discussing the subject of RAMA with Greg Perez. However, on the latter point, Cranson averred, "We always talk about RAMA" and conceded that he and Perez "could have" discussed RAMA and the Union.

Greenlee "asked me what my gripes were." Hudnall responded that he wanted a raise as he had taken numerous tests and passed them in order to become more proficient as a welder. Stating he was not supposed to mention the Union, Greenlee responded, "You think the Union is going to get you a raise. . . . that will never happen." Hudnall then raised the matter of benefits, saying that other companies in the Odessa area give better benefits and better pay than Respondent. To this, Greenlee replied that Hudnall was comparing different types of work, like "salt with pepper." He then warned that Hudnall should keep his mind on his own job and not "worry how much you are making or you are going to be fired." Gregory Perez testified to a July conversation with Greenlee which occurred in front of Cranson's office. According to the witness, Greenlee initiated the conversation, asking "me why we wanted a union" and saying "that the union wasn't going to do anything for us but give us . . . dues. He said that we had the best benefits out there already." Perez denied ever having disclosed his union sentiments to Greenlee prior to this conversation.

Ed Greenlee admitted speaking to Gregory Perez in front of Cranson's office and asking why "the guys" wanted the Union ("I just asked him what the guys were wanting, why they were upset, what their feelings were?") but denied warning that the Union would get them nothing but dues. As to a conversation with Hudnall, Greenlee recalled a conversation with the employee during which Hudnall questioned why he had not received a raise. According to Greenlee, Hudnall "was concerned . . . why other . . . welders were making more money than he . . . was." Greenlee replied that he had different welding skills and was slower than the others. "I told him . . . he needed to pick up his speed, worry about his job, and not worry about what everybody else was making or . . . doing." He denied any threat of job loss.

3. Alleged postelection retaliatory unilateral changes

The Union received a majority of the votes cast in the August 10 representation election by a margin of one, 26-25, and the Union was certified by the Regional Director of Region 16 on August 20. Within days, of the election, it is alleged, Respondent instituted two significant changes in employee working conditions without offering to bargain with the Union prior to implementation and in retaliation for its employees' act of voting in favor of union representation. The first of these involves a change in Respondent's practice regarding employee break periods. As to this, there is no dispute that Respondent gives its employees two 15-minute break periods each day, one in the morning and one in the afternoon. There is also no dispute that a whistle is blown to signify the start of a break period; that a second whistle is blown 12 minutes into the break period, signifying to employees that they have to finish their food and drink and return to their work stations; and that a third whistle is blown at which time the employees are supposed to resume working. Employee Jeff Hamilton, who works in the layout department, testified that, in the 6 years he has been employed by Respondent, the practice had been that "after the break was over, we could take a can of pop out back to work area, or a candy bar" and finish the food or drink while working. He added that he observed such as the practice for employees in other departments, as well. However, he continued,

after the election, "things started tightening up" and Ed Greenlee announced "that we could not take anything out of the break rooms." Witnesses Munoz and Hudnall corroborated Hamilton on this change in work practice. According to Hudnall, the change occurred within a day or two after the election, and, according to Munoz, the practice prior to the election was "if you still had a coke or candy, you could take it out there and finish eating or drinking" but, after the election, "that wasn't allowed any more." He added that, "about two weeks after" the election, he was approached by Greenlee at the end of a break period while "I was going to the time clock with a cup of coffee in my hand and he . . . told me to dump it out."⁵

Welding Department Supervisor Cranson testified that there is supposed to be no food or drink taken from the breakrooms to the work areas but stated "at times some [employees] get lax" and "I just remind them no food or drink on the floor and they dispose of it." Later, he testified that the foregoing was an "off and on" problem and that "we have clamped down" whenever such has occurred during the course of his employment by Respondent. Cranson admitted such a clamp-down "right before" the election. Plant Manager Greenlee likewise testified that the company rule has always been not to permit food and drink to be taken back to the work areas after breaks. While stating that the common practice of employees is to follow the rule, Greenlee added that enforcement is "an age old problem" and that "on several different occasions," Respondent has observed that employees "would still have coke or coffee in their hand when they got to their work area . . . and have it sitting there when they were supposed to be back at work." During cross-examination, Greenlee admitted that the company rule, regarding food and drink at the work stations, is not in writing and that violations occur on a daily basis. He further admitted that, in August 1990 both before and after the election, given the longtime abuse of this policy, he was instructed to clamp down upon employees who disregarded it. Notwithstanding his assertion that stricter enforcement began prior to the election, Greenlee was unable to state if he meant the first 9 days of August.

The second alleged retaliatory change in employee working conditions concerns the distribution of paychecks. On this point, witnesses Hudnall, Munoz, Cadena, Perez, and alleged discriminatee, Frank Mendoza, each testified that, prior to the election, their Supervisor Cranson would distribute the weekly paychecks to the welding department employees "on Fridays . . . on our 2:30 break" and, if later, always before 3 p.m. and that the time of distribution of the paychecks had been the same for many years. This practice seems to have been important to employees as, upon receipt of the paychecks, many would go outside and give the checks to their waiting wives who, in turn, would go to local banks and either cash or deposit the checks. Frank Mendoza testified that, on the Friday of the week following the election, Cranson failed to distribute the employee paychecks at the accustomed time and that he spoke to Cranson and asked why. Cranson replied that Greenlee told him to distribute them at 5 p.m. At 5 p.m. and after Cranson again failed to distribute the checks, Mendoza again asked why, and Cranson replied that Greenlee wanted them given out at quitting time. The

following week, a notice, signed by Ed Greenlee and dated August 20, was posted on employee bulletin boards. It read as follows:

Effective immediately, shop hourly payroll checks will not be released until Friday at quitting time of each employee.

This change is due basically to the change in hours being worked by the shop and will remain in effect until further notice from management. This payroll will be distributed by the foreman of each department and may not be picked up in your absence before quitting time of your respective departments. Further, no checks will be released to anyone without written permission from you which will be filed in your personnel file.⁶

Gregory Perez testified that, one Friday after the above change had been implemented, he was speaking to fellow employee, Bill Burgess, who expressed displeasure about the change. Greenlee happened to walk past, and Burgess asked why he could not have his check. Greenlee said he would be given the check at quitting time, and after Burgess continued complaining, Greenlee responded, "The union is not going to tell me when to pay." Burgess responded that the plant manager's attitude was why the employees had voted for the Union. To this, Greenlee replied, "I don't give a damn about the union. You had my hands tied for 20 days but my hands are untied now. . . . I can do what I want."⁷

Russell Cranson could not recall ever having a practice of distributing employee paychecks on Friday afternoons at 2:30 p.m. because he did not receive them until that time. He then conceded that he "sometimes" distributed the checks at 2:45 p.m., immediately after the break period. Continuing, Cranson testified that, as with the break period change, the practice was changed in August 1990, but "it was before the election." As to the August 20 notice, Cranson averred that "It is not a change. It was just enforced." However, after reading the notice, he conceded such represented a change in policy. The author of the August 20 document, Ed Greenlee, testified that Respondent's practice was not to distribute any paychecks before 3 p.m. on Friday afternoons because of Respondent's banking practices but conceded that distribution before 3 p.m. "could have happened." During cross-examination, Greenlee testified that the August 20 document merely "clarified" Respondent's paycheck distribution policy resulting from a "disruption" in the plant caused by employees, who received paychecks during the 2:30 p.m. break, leaving the plant and giving their paychecks to waiting wives. He added that such had been an "on-going problem"

⁶The detrimental effect of this announcement upon employees seems clear. Thus, the record establishes that normal quitting time for employees in the time period of the representation election was approximately 5:30 p.m. and that, according to Greenlee, under the new policy, many employees were not paid until as late as 7:30 p.m. Such meant that employees would not be able to get their paychecks to the bank until the following Monday.

⁷Greenlee testified that this conversation occurred prior to the election, that Burgess accused him of changing the check distribution time, and that he denied it, saying that the policy always was to distribute the checks at 4 p.m. on Friday and not sooner. Indeed, a notice to employees, signed by Greenlee and dated July 17, 1989, states that "effective immediately, shop hourly payroll will not be released until Friday at 4 p.m. of each week."

⁵Munoz conceded that he was not disciplined by Greenlee.

during his tenure as plant manager. However, Greenlee conceded that the August 20 document states nothing about an “on-going problem” of disruption of the work place and that the stated reason for the new distribution time was a change in the hours worked. In view of this discrepancy, asked for the actual basis for the change, Greenlee said, “It was a disruption in the work place.” Next, the plant manager refused to concede that the wording of the notice represented any sort of change in working conditions, once again terming it “just a clarification.” However, he did acknowledge that the notice itself constituted “a change.” Greenlee conceded that, although the disruption of the work place had been ongoing for some time, the “clarification” was not made until immediately after the representation election which Respondent lost by a margin of one vote. Finally, Attieson Halbrook echoed Greenlee’s assertion that the August 20 notice did not constitute a change—“It says change on it but it is not a change. It is just a clarification.”

There is no evidence, nor any contention by Respondent, that it offered to bargain with the Union prior to implementing either of the two above-described alleged alterations of past employment practices.

4. The alleged discrimination against Frank Mendoza

On or about September 20, 1990, alleged discriminatee, Frank Mendoza was permanently transferred to Respondent’s painting and sandblasting department at a wage rate of \$9 per hour. For the previous 5 years, Mendoza had been employed as a material dispatcher in Respondent’s welding department, and, at the time of his aforementioned transfer, he was earning \$10 per hour. The consolidated complaint alleges that Mendoza’s transfer to the painting and sandblasting department and the attendant reduction of his rate of pay constituted a discriminatory demotion based upon his suspected leadership role in the successful union organizing campaign.

The record establishes that, as the material dispatcher in the welding department, Mendoza utilized an office, with a desk and telephone, next to that of the Welding Department Supervisor Cranson and that, with regard to his job duties, “my job was to order all of the parts that the welders are going to need, look at the [blueprints] . . . check the prints if they are correct, and . . . if there were any mistakes . . . then I would order into the warehouse . . . and I would send some to the layout department.” Continuing, Mendoza testified, he also “used to run the crane . . . and when the welders need something, I would go out there . . . and . . . do the job of layout.” Further, according to Mendoza, he performed “hydro” tests on vessels for welders and cutting jobs. During cross-examination, the alleged discriminatee admitted that he was experienced at performing various jobs throughout the plant and that he could be termed a jack-of-all-trades. On this point, Mendoza said he would show welders how to “hang heads,” which are cast iron slabs of metal, shaped like grapefruit halves, and used to seal the ends of the vessels, occasionally performs grinding work, cuts and threads pipe, works as a quality tester, and helps pipefitters in the insulation department.⁸ In addition to his regular mate-

rial dispatcher job duties, Mendoza occasionally served as acting foreman in the welding department “when Russell would take off early or he would miss a day and he would take vacations.” Asked how frequently, Mendoza estimated “about four or five times” during an average month. On this point, Russell Cranson testified that Mendoza substituted for him just “two times” in 1990; however, during cross-examination, he stated that one of these occasions was for an entire week (May 29 through June 2). Asked how frequently Mendoza substituted for him in 1989, Cranson said it was “just a couple of times.” Contradicting him, Respondent’s time records for 1989 (G.C. Exh. 20) disclose he acted for Cranson six times that year, twice for 2-day periods.

Mendoza testified that he first became aware of the Union’s organizing effort in June, that he attended organizing meetings at the Best Western Hotel in Odessa, that he received a handbook from the Union, that he signed an authorization card for the Union, that he spoke to other employees about the Union, and that he distributed authorization cards to other employees. While there is no evidence that Mendoza was one of the employee leaders of the organizing campaign, there is no record evidence that Respondent may have believed such was the case. Thus, there is no dispute that, one afternoon prior to the election, Mendoza went to Ed Greenlee’s office and asked why two known nonunion supporters, Terry Gray and Johnny Blaylock had been transferred to other jobs rather than “other guys.” Greenlee replied that management had the right to what it wanted but, in any event, he would have an answer for Mendoza the next day. When he reported for work the next morning, the alleged discriminatee saw a notice, announcing a meeting in the breakroom for later that morning. Approximately 20 to 30 employees attended, and Greenlee, who conducted the meeting announced that Mendoza had spoken to him the day before about the transfer of two employees in the service department and said that he wanted all the employees to hear his response directly rather than second hand. At this point, Mendoza stood and interrupted, saying the matter was just between Greenlee and himself. The plant manager told him to sit and be quiet and gave his explanation for what happened. As the meeting ended, Greenlee requested that Mendoza wait. The foregoing is not in dispute; what was said between them after the meeting is. According to Mendoza, Greenlee began by admonishing him “not to put him in a situation like that never.” Mendoza defended his actions, saying Greenlee had caused it by promising it was between

body in the [welding department] if they needed help. He stayed busy all the time.” In short, according to Cranson, Mendoza “was a helper,” with 75 to 90 percent of his time devoted to such activities—“It doesn’t take that long to do the materials.” During cross-examination, Cranson denied that Mendoza performed all the job functions (reading blueprints, obtaining and returning material to the warehouse, preparing paperwork, delivery parts, keeping an inventory of parts, and assuming delegated responsibilities for material control) of a material dispatcher each day but, rather, only during inventory.

William Hudnall described what Mendoza did for the welders as follows—“he would gather the prints up, distribute all the material and bring them to our work area. And then he would discuss ways to speed up production or . . . if we needed any material or . . . parts, then he would write up a requisition and go and get it and return it to us.” He confirmed that Mendoza helped in other departments but “not on a daily basis.”

⁸Russell Cranson testified that, in an average day, Mendoza would spend between 5 and 30 minutes requisitioning parts and materials from the warehouse, would run a crane, and “he . . . helped every-

the two of them. Greenlee replied, "I don't have to talk to you to get to the union." Mendoza asked if Greenlee was accusing him of being the "head man" in the campaign, and Greenlee said, "You are damn right I am." Continuing, Greenlee said that Mendoza was "pretty smart" being a Mexican. Mendoza asked if the former was implying that all Mexicans were dumb; Greenlee replied that Mendoza could "take that like you want to." Contrary to the employee, the plant manager's version of what was said after the meeting is that "I explained to him why I did that, that I wanted to give my answers to the people firsthand and not have to talk through him to them."

There is no dispute that, during the week prior to the election, Mendoza wore a "vote yes" button while he worked. There is also no dispute that, at approximately this time, Respondent's executive vice president Halbrook approached Mendoza in the layout area, showed him a copy of the Union's constitution, and asked if he had ever seen it. Mendoza said that he had but that he had not read it. Thereupon, Halbrook pointed out that the constitution stated that a member could be placed in jail for failing to pay his "fees" to the Union. According to Mendoza, when Mendoza said he would not want that to happen, Halbrook said, "I know that you carry the Hispanic vote so make sure you let them know about that." Halbrook denied this comment but admitted instructing Mendoza to tell other employees he had copies of the Union's constitution. Also Mendoza was the only employee to whom Halbrook spoke in this regard. Further, there is no dispute that Mendoza acted as the Union's observer during the election. According to him, the next day, Cranson told him "that I was going to be foreman no more" because "Ed Greenlee wanted a welder." Subsequently, Mendoza approached Greenlee on the matter, and the latter confirmed what Cranson had said, saying "I need a welder there." The employee threatened to report the matter to the Union, and Greenlee said he could tell whomever he wanted and "he wasn't afraid of nobody about it." Greenlee, who denied any knowledge of Mendoza's support for the Union until he acted as the Union's election observer, failed to deny this conversation.

The record establishes that Mendoza, who, a few years before, had voluntarily performed sandblasting work for 2 days, was temporarily transferred to the painting and sandblasting department to do sandblasting on September 5, 1990, and worked in that status for a 2-week period. Ed Greenlee testified that, in early September, the painting and sandblasting department was understaffed. Moreover, according to the plant manager, the department's supervisor, Armando Ortiz, had gone on vacation, leaving two individuals, a painter-coater, Jose Galindo,⁹ and a sandblaster, to perform all the work, which included some specialized work. Then, 2 days after the foreman left for vacation, Galindo became injured and unable to work.¹⁰ Realizing that he needed workers in the painting and sandblasting department, Greenlee determined that the only experienced individual who could be spared for transfer on a temporary basis was Frank Men-

doza.¹¹ In this regard, according to Greenlee, no welder¹² or employee in any other department was available for transfer on a temporary basis.¹³ Having decided upon Mendoza, Greenlee went to the acting foreman in the welding department (Cranson was on vacation), "and I told him I needed Frank to go to the sandblast area to help out." Even with Mendoza temporarily helping, Greenlee had no one in the painting and sandblasting department who could do coating work. Accordingly, within a week, he hired a painter and a painter-coater, and he asked the Foreman Ortiz to return from his vacation.

Within the 2-week period during which Mendoza was temporarily transferred to the painting and sandblasting department, according to Greenlee, he decided to make the transfer a permanent one. Mendoza testified that he first became aware of the decision when Greenlee approached him in the paint shop, and "he told me he was going to transfer me." Mendoza asked why, and the plant manager replied that management had the right to do so and that his hourly wage rate would be reduced to \$9 per hour. The alleged discriminatee threatened to go to the NLRB, and Greenlee said that he should "go ahead." Later, that same day, according to Mendoza, Foreman Ortiz told him that Greenlee wished to speak to him in Ortiz' office. When Mendoza arrived there, he found Greenlee waiting with the Company's personnel manual, and the latter said he brought it so that Mendoza could read it. The latter refused, saying that Greenlee had done "what you wanted to do to me. So he said, you know, the best thing for you to do . . . is quit." Mendoza refused, and Greenlee said, "Once you guys go up there [negotiating], you ain't going to get a damn thing, we ain't going to give you nothing." He continued, saying "he knew who was in the union . . . and 'all the employees that are union—I am going to see all of them hit that door one

¹¹ Greenlee testified, "I knew that Frank had prior experience sandblasting. He had worked there [in the past] . . . and I could take Frank out of the department without having to take a welder or disturb any of the other jobs that I had going."

There is no dispute that Mendoza had no painting experience and cannot perform that kind of job. Greenlee did not explain why it was necessary to temporarily assign a sandblaster to the painting and sandblasting department when it appears that the immediate need was for someone with painting or coating experience.

¹² Greenlee did not want to transfer a welder who had sandblasting experience, for "if I had taken a welder, then I would have stopped [a] job."

Russell Cranson was questioned by counsel for the General Counsel about two welders, Antonio Saucedo and Oscar Vanegas, who had sandblasting experience. Cranson said both were needed, at the time, for welding jobs, and Greenlee corroborated him on this.

¹³ Under questioning by counsel for the General Counsel regarding test department employee, Javier Rozco, Greenlee said he had "very little" experience in painting and sandblasting and denied that Rozco had more experience than Mendoza. Also, regarding employees David McCarter and Cecil Wood, both of whose timecards indicated painting and sandblasting experience, Greenlee denied either was doing such work but failed to explain what they, in fact, were doing.

Finally, Executive Vice President Halbrook testified that, in September 1990, at least 10 percent of the work force had experience doing painting and sandblasting work. In these circumstances, there is no record evidence, other than regard to welders, why employees from other departments were not available for temporary transfer, especially when Mendoza's experience on the job was limited to 2 days of sandblasting work some years before.

⁹ "Coating" involves spraying a special coating on the inside walls of a vessel and requires a "qualified and experienced" worker. According to Greenlee, ordinary painters are not qualified to do this work.

¹⁰ As of the date of the instant hearing, Galindo had not yet recovered from his injury.

by one.” Greenlee testified that he informed Mendoza about the permanent transfer on the Thursday or Friday before it was to take effect in his office, and “I told him that we were going to transfer him permanent to the pain [sic] and sandblast department, that we needed him there, and we were going to do away with the material dispatcher job.” Greenlee further testified that Mendoza “wasn’t happy” and threatened to go to the NLRB. While specifically denying the comments, attributed to him by Mendoza during their second conversation, Greenlee admitted that conversation, 2 days after the permanent transfer became effective, did, in fact, occur. According to Greenlee, after learning that Mendoza had been discussing his reduced wages with other painting and sandblasting department employees, he went to that area and spoke to Mendoza in the foreman’s office. After pointing out to the employee that the personnel policies manual prohibits employees from discussing their wages, Greenlee asked if Mendoza was “familiar” with that provision and, thereupon, showed it to the latter. Mendoza became angry and denied what Greenlee alleged. The plant manager then “told him that discussing his wages or anybody else’s was grounds for termination.” Greenlee further testified that Mendoza said he was not afraid of the former or of dying and facing the devil. Greenlee asked if Mendoza understood the policy, but, according to Greenlee, he was unable to recall Mendoza’s response, if any.

As to Respondent’s decision to permanently transfer the alleged discriminatee, Greenlee testified that “the work was such out there that we still needed him to help sandblast, and . . . we found that by rearranging things in the plant, we could get by without the material dispatcher. It didn’t interrupt anything.” He further testified, as with the temporary transfer, that no other employee could have been permanently assigned inasmuch as the only other experienced people were welders, “and I was needed welders” at the time and that, in fact, no other employee was even considered for permanent transfer. On this latter point, Greenlee stated, “In my opinion, he was the only one I had available that I could take out of the shop and put out there.” Russell Cranson, the welding department foreman, testified that, prior to the permanent assignment of Mendoza to the painting and sandblasting department, he and Greenlee undertook an analysis of what Mendoza did and concluded “that I could do it” rather than requiring Mendoza to remain in that capacity or hiring someone else. Cranson added that Mendoza’s material dispatcher work takes no more than “about ten or 15 minutes a day” and denied that Mendoza’s absence has affected the efficiency of his department in any way. Disputing this latter assertion was William Hudnall, who asserted that, without the help given him by Mendoza, he was forced to spend between “five to ten hours a week” doing what Mendoza did for him. According to him, the increased work included obtaining parts, moving equipment, rearranging the floor, and reading blueprints. Cranson disputed Hudnall’s estimate of the amount of time he spent doing work that Mendoza had customarily done but conceded Hudnall “had to do more work.” Greenlee also disputed Hudnall’s testimony, stating that “where [he] works, all of his parts are stacked right there” and averred that welders “have always chased some of their parts.”

The second aspect of the alleged discriminatory demotion is, of course, the reduction of Mendoza’s rate of pay from

\$10 to \$9 per hour. At the outset, in this regard, the record establishes that the wage rates in the welding department range from \$8 to \$11 per hour and that, at the time of Mendoza’s transfer to the painting and sandblasting department, no worker in that department, other than the Foreman Ortiz, earned as much as \$10 per hour. As to why the alleged discriminatee’s rate of pay was reduced, Ed Greenlee testified, during direct examination, that Respondent’s policy is that an employee’s wage rate remains the same “when there is a temporary transfer.” However, such is “not necessarily” the result for a permanent transfer as when an employee is permanently transferred from one department to another, he “will be paid no more than the highest paid” in the new department.¹⁴ In the case of Mendoza, Greenlee continued, his wage rate had to be reduced to \$9 per hour, “which was the top pay in the paint and sandblast area.” The plant manager added that the painter-coater, Jose Galindo, who was off work on disability at the time, was earning \$9 per hour and would have complained had a less experienced worker been paid more than he.¹⁵ Asked if any other permanently transferred employee ever had his wage rate reduced, Greenlee initially replied, “No, sir. This is the first occasion.” Later, however, he changed his testimony, saying that, “several years” before, employee Johnny Blaylock had his wages reduced as a result of a permanent transfer; Greenlee offered no corroborating evidence in support of this changed testimony. During his cross-examination, Greenlee’s testimony became confused as to the reason why Mendoza’s wage rate had been reduced as a result of the permanent transfer to the painting and sandblasting department. While the tenor of his direct testimony was that keeping Mendoza at \$10 per hour would have caused “dissension” in the department, the thrust of his answers to questions posed by counsel for the General Counsel was different. Thus, noting that, within the job classifications in the painting and sandblasting department, there is no wage scale for sandblaster and wage rates for those classified as painters range up to \$11 per hour, Greenlee testified that, given the fact that Mendoza does “very little painting,” his wage rate was cut “because he can’t do what that classification says.” Greenlee elaborated further, “I am saying that the job he was doing, that classification, his pay rate wasn’t that high, so . . . I couldn’t pay him more than his classification calls for.” Nevertheless, Greenlee conceded that Mendoza was, and remains, a long-term, valued employee and that a determination of his wage rate at the time of his transfer was solely within Respondent’s discretion. Finally, as to Mendoza’s wage rate, Greenlee stated that the two new hires in the painting and sandblasting department were paid the same wage rate as earned by Mendoza (\$9) but that he considered them to be “more qualified” than the alleged discriminatee.

¹⁴ According to Greenlee, this policy has been in effect “as long as I have been” employed by Respondent.

¹⁵ Asked why there would have been a problem given Galindo’s continued absence from the plant, Greenlee said, “The problem would have been with him knowing about it.”

5. The alleged unlawful contract with an independent laboratory for employee drug testing

In the fall of 1989, Respondent's personnel manager, Ronnie Dunn, met with Roy Harrison, the owner and president of Harrison & Associates Forensic Laboratories, with regard to establishing a drug testing program for Respondent's employees, and Harrison gave Dunn a written package, describing his company's services. Also, Harrison advised Dunn that Respondent should implement a testing program slowly and with "all your ducks in a row" and stated that his company would be available to provide testing services in the future if requested to do so. Thereafter, according to Attieson Halbrook, on January 1, 1990, Respondent implemented a comprehensive drug testing policy for its employees, announcing it in a letter disseminated to employees on May 1. The letter set forth that use of narcotics and illegal drugs was prohibited, stated that employees may be required to take urinalysis tests, and announced that "the program will become effective 90 days from the date of this notice, or August 1, 1990." According to Halbrook, Respondent decided to utilize the services of Harrison Forensic Laboratories "in late April," and Ronnie Dunn telephoned Roy Harrison with the news. Dunn told Harrison that the policy would not go into effect for 90 days, and, presumably, Harrison told Dunn to inform him as to when Respondent wished to commence conducting drug tests of its employees. Apparently, there was no discussion of the cost inasmuch as such had been a subject of the written material, which Harrison had provided to Respondent earlier.

There is no issue as to whether a contract between Harrison's company and Respondent existed prior to August 1990, and the parties herein seem to agree that, at most, Dunn's conversation with Harrison in April constituted Respondent's acknowledgement of its intent to use Harrison & Associates Forensic Laboratories for the purpose of conducting drug tests of its employees. In fact, while Roy Harrison assumed there would be a contract,¹⁶ he acknowledged that no contract was reached with Respondent until he was contacted by Respondent in August to actually perform testing on specified days that month, a fact not disputed by Attieson Halbrook. Further, as to when the contact between the parties occurred, at which point a contract for Harrison Associates' services presumably was consummated, Halbrook initially testified that such was "ten days to two weeks prior to the time that Harrison came in . . . and performed the drug sample," which date, there is no dispute, was August 22. Later, he testified, "We subsequently, after the election, contacted [Harrison] and made arrangements for them to do the testing."¹⁷ Finally, there is no dispute that Respondent did not offer to bargain with the Union prior to actually arranging with Harrison & Associates Forensic Laboratories to

perform drug tests of its employees in August, including its production and maintenance employees.¹⁸

6. The alleged unlawful unilateral changes

The record establishes that Respondent's employment practices and procedures are contained in an employee manual, a copy of which is provided to each bargaining unit employee, and that each departmental supervisor has a policy manual, which contains more detailed information on the subjects contained in the employee manual. It is undisputed that, in or about October 1990, Respondent published a revised employee manual and provided a copy to each employee. It is alleged that various changes in said manual were implemented unilaterally and without affording the Union, as the collective-bargaining representative of Respondent's production and maintenance employees, to bargain over the changes prior to becoming effective. As to the alleged changes, two are found in the vacation policy. The first, according to employee Orbie Edson, concerns potential plant shutdowns—"Each plant will be closed for two weeks for repairs. Two weeks of your vacation must be taken during this period for Plant Personnel," which language, Edson stated, never appeared in any previous manual. The second vacation policy change concerns language, mandating that employees return from vacations "if necessary . . . for the convenience of Sivals, Inc. to assure the smooth operation of a department." Edson testified that said language had never previously appeared in the employee manual and that he had never been required, in the past, to return early from a vacation and work. With regard to these alleged vacation policy changes, Respondent conceded that the first represented a new policy made necessary by an anticipated plant shutdown during the summer of 1991 and asserted that, in a revised employee manual, issued subsequent to that which was published in October, the word "will" was changed to "may." As to the second alleged change, Ed Greenlee testified that the vacation return policy has been in effect since December 1981 when a notice, containing the same language as stated above, was posted on employee bulletin boards and that the language has been found, since that time, in the policy manuals, which are possessed by all supervisors and which are always available to employees for reviewing.

A third change in employees' terms and conditions of employment in the new employee manual, according to Edson, concerns voting absences. The record establishes that, prior to the publication of the new manual, employees were permitted an absence of 1 hour, with pay, in order to vote in any local, state, or national election. This practice was changed in the new manual, which permits employees to take a 1-hour unauthorized absence, without pay, in order to vote. The final alleged change concerns the deletion of the material dispatcher job classification within the welding department. Until the transfer of Frank Mendoza to the painting and sandblasting department, his job classification had been set forth as a job classification in the welding department. Respondent offered no evidence as to the latter two alleged changes in employee terms and conditions of employment, and there is no contention by Respondent that it offered to

¹⁶ Harrison testified that his company does not enter into written contracts for drug testing and, at most, requires a letter of intent from a prospective client. Such was, apparently, not necessary with regard to Respondent.

¹⁷ In his prehearing affidavit, Halbrook referred to Respondent's August arrangements with Harrison & Associates as "contracting with" but, during his testimony at the hearing, asserted that the proper words were "contacting with."

¹⁸ As a result of the August drug testing and followup tests performed in October, no less than seven employees were terminated for having failed the urinalysis testing.

bargain with the Union prior to implementing any of the aforementioned changes.

7. Respondent's alleged failure to provide requested information and bad-faith, surface bargaining

Two weeks after the Union's election victory, on behalf of the Union, Freddie Sanchez, the temporary International representative, and Lonnie Edwards, a full-time International representative, executed and mailed a letter, dated August 24, to Respondent. Addressed to Attieson Halbrook, the letter stated that the Union was ready to commence negotiations for a collective-bargaining agreement, asked Halbrook to notify the Union as to when he would be available for negotiations, and requested that Respondent provide the following information, necessary for "preparation for our upcoming contract negotiations":

1. Names of all Bargaining Unit Employees.
2. Age of all employees.
3. Date of hire.
4. Classification.
5. Rate of pay.
6. Average hours worked per week by employees.
7. List of fringe benefits currently provided—such as pensions, insurance, profit sharing, holidays, vacations, etc.

Approximately 2 weeks later,¹⁹ Freddie Sanchez received a telephone call from Respondent's attorney, James McNutt, who stated that he would be representing Respondent during collective bargaining, and he and Sanchez discussed their availability to commence negotiations. During the conversation, according to Sanchez, he inquired as to the requested information, and McNutt said he would speak to his client. McNutt also promised to telephone Sanchez as to a date for the start of bargaining. Subsequently, McNutt and Sanchez spoke and agreed to meet for bargaining on October 17 at the Best Western Hotel in Odessa. Sanchez added that, prior to the above date, he became aware that Respondent had issued a revised employee manual to bargaining unit employees and had changed its practices as to the distribution of payroll checks and break periods and that the Union was neither given notice of any manual revisions or changes of past practice nor afforded an opportunity to bargain prior to implementation. There is, also, no dispute that, prior to the date scheduled for the start of bargaining, the Union received none of the requested information from Respondent.

As scheduled, representatives of the Union and Respondent met at the Best Western Hotel in Odessa on October 17, 1990.²⁰ Sanchez and Lonnie Edwards represented the Union, and McNutt, Halbrook, and Greenlee were present for Respondent. Sanchez testified that the meeting began with a

discussion of the unfair labor practice charges, which had been filed between the day of the election and that date, and the possibility of settlement through negotiations, however, McNutt asserted "that at this time they had no intention of changing their position." Then, according to Sanchez, he submitted to Respondent's representatives General Counsel's Exhibit 9, a single sheet on which were set forth 14 bargaining proposals. Attached to this sheet, he continued, was a "sample agreement," which, he explained to Respondent's representatives, "was for language on recognition, dues checkoff proposal, seniority and that there was stuff . . . that . . . had nothing to do with our proposal." Sanchez testified that McNutt agreed to review both documents and that McNutt and Halbrook indicated that they understood the purpose of the sample contract. Also, Sanchez raised the matter of the Union's request for information, saying he "needed this information for preparation for negotiations. And Mr. McNutt said it wasn't available at this time, that he would have it for us at the next meeting." Respondent had no proposals for the Union, the entire session lasted for 3 or 4 hours, and, at the conclusion, McNutt said that he would contact Sanchez regarding scheduling a second bargaining session and would review the Union's proposals with Halbrook. During cross-examination, Sanchez maintained that the sheet containing 14 proposals and the sample contract were given to Respondent's representatives at the start of the meeting, and "we discussed it," with "Mr. Halbrook [making] comments on what the hell is this, and we explained." Finally, on settlement of the unfair labor practice allegations, Sanchez stated that he told Respondent "you restore them the way they were, and we would negotiate on them" and that the response of McNutt was that Respondent's position "would remain the same on them."

With regard to what occurred during this initial bargaining session, Attorney McNutt and Attieson Halbrook contradicted Sanchez on one significant point. According to McNutt, what was presented to Respondent's negotiators at the outset of the meeting was only the single sheet, which contained the Union's 14 bargaining demands and which was discussed "in detail, item by item." Then, near the end of the session, Sanchez handed him what seemed to be a "generic" contract, and Sanchez confirmed that it was merely a "sample contract." Denying that Sanchez made any explanation as to which, if any, provisions would apply to Respondent, McNutt testified that, upon examining the document, "I told [Sanchez] this meant nothing to me, that it wasn't tailored to Sivals" and that he needed to do so. Corroborating McNutt that Sanchez did not present the "sample contract" to Respondent's negotiators until late in the bargaining session, Halbrook contradicted him as to whether Sanchez offered any explanation of its purpose. Thus, according to Respondent's executive vice president, while he did not pay any attention, Sanchez "made reference to some items that didn't apply."

Freddie Sanchez testified that, having heard nothing from Respondent's attorney, with regard to arranging a second bargaining session, for 13 days, he telephoned McNutt's office, and, after an exchange of telephone calls, Sanchez and McNutt arrived at a second meeting date, November 28. Stating that he was dissatisfied with the pace of the bargaining, Sanchez wrote a letter, dated November 3, to McNutt in which he complained to the attorney that the pace of negotia-

¹⁹ During the interim period, Respondent terminated two employees for having failed their drug tests, and Sanchez wrote a protest letter, in their behalf to Respondent. In his letter, Sanchez requested a meeting; Halbrook telephoned him a week later and said he would be unavailable for such a meeting. Apparently, nothing was said with regard to the August 24 letter.

²⁰ The Odessa Best Western Hotel is located 5 miles from Respondent's plant. There is no dispute that this hotel was the location for all bargaining sessions between the parties and that the Union arranged and paid for the meeting room on each occasion.

tions was too slow and that the 6-week period between bargaining sessions did not constitute bargaining in good faith. McNutt wrote back to Sanchez in a letter, dated November 12, stating that the above date was the first available one for all members of Respondent's "negotiating committee" and that, as of that date, he had not received a promised "written proposal in contract form" from Sanchez.²¹ Three days later, along with a cover letter dated November 15,²² Sanchez mailed to McNutt a two-page, handwritten outline of the Union's bargaining demands, with the document being similar to the single sheet of proposals given to Respondent on October 17.

As arranged, the second bargaining session between the parties was held at the Best Western Hotel on November 28, with the same representatives present and with the Union paying the cost of the meeting room. Sanchez testified that the meeting began with Halbrook "throwing our sample agreement on the desk and saying that he couldn't make heads or tails of it, that we were contradicting our proposals . . . that we had two sets of proposals. Talking about vacations and holidays, he said he didn't know which one we were talking about." According to Sanchez, he replied to Halbrook that "they had agreed to take our proposals and review them and come back with counter-proposals and that I felt that he was just stalling us." Continuing to speak directly to Halbrook, Sanchez said that if he hadn't been willing to take the sample contract, "he should have told me at the first session and I could have written specific proposals. And I agreed to do just that." To this, McNutt said he would need, at least, 1 week to review what Sanchez drafted. Then, Sanchez testified, he renewed his request for the information, which he had requested in his August 24 letter and which the Union had not as yet received, and "Mr. Halbrook said that I would not get it" inasmuch as "he said I had it all." Halbrook added that Sanchez had received the information from the bargaining unit employees in the form of the *Excelsior* list and copies of the old and new employee manual. The meeting ended after just 90 minutes.

There is no dispute that, at the outset of this meeting, Respondent voiced objection to the lack of a union proposal in contract form; however, McNutt and Halbrook contradict each other as to who spoke. According to McNutt, as to what he received from Sanchez prior to the second bargaining session "still did not address some of the matters that were raised" at the first meeting, he "could not put them all together to where I had what I considered to be a written proposal that we could start negotiating from." McNutt stated that he voiced this concern to Sanchez at the second meeting,

²¹ Attieson Halbrook testified that he was extremely unhappy with what he was given by the Union at the October 17 bargaining session and that what he wanted was "everything down in writing," something akin to a commercial contract. He added that the single page containing 14 demands and the sample contract "just didn't make any sense" to him. It seems clear that Halbrook's concerns were expressed by Attorney McNutt to Sanchez during one of their late October telephone conversations, but exactly what was said is in dispute. Thus, according to the attorney, he told Sanchez that "it was important that he provide to us the next time we meet a contract document that would be tailored to Sivals"; while Sanchez recalled that McNutt merely wanted "clarification on the proposals."

²² In this letter, Sanchez restated his August 24 demand for information necessary for collective bargaining.

"and I was insistent . . . upon it being reduced to written form, so that there would be no misunderstanding . . . as to what was meant or what was being proposed." Further, McNutt denied that Sanchez asked why he had not mentioned this at the first bargaining session so that he could have prepared such a document before. According to Attieson Halbrook, rather than McNutt, he was the one who said he couldn't "make . . . heads or tails" of the Union's proposal, and "I requested that Mr. Sanchez provide us with a proposal in writing that contained everything that the Union wanted." Furthermore, while not denying that Sanchez reiterated his August request for information at this bargaining session or that he refused said request, Halbrook asserted that, at the preelection conference in August, he observed Sanchez with what he recognized as a standard computer printout of the type Respondent's payroll department normally produces ("green with a white background") and that said document contains such information as employees' names, classifications, social security numbers, departments, wage rates, and hours worked. Questioned as to what he saw, Halbrook asserted that "I was sitting close enough to read some of the names on [the document]."²³

Subsequent to the November 28 bargaining session, as he had promised, Freddie Sanchez prepared a proposal, in complete contractual form and specific to Respondent, and mailed it to McNutt. The document contains suggested language on many provisions including a dues-checkoff clause, a management-rights clause, no strike/no-lockout language, and a grievance and arbitration procedure. Also, Sanchez and McNutt spoke by telephone and agreed to hold another bargaining session on December 20 at the Best Western Hotel.²⁴ The parties met on that date, with the same individuals in attendance.²⁵ At the outset, according to Sanchez, he raised the matter of sharing the cost of the meeting rooms. McNutt said that he had discussed the matter with his client, and "his client's position was that they would meet anywhere except on company property but they wouldn't pay no room. . . . Mr. Halbrook made the statement that . . . we brought the union in, we ought to pay for it."²⁶ McNutt added that Respondent believed that the parties should continue to meet at a neutral site.²⁷ Substantive discussions then began with

²³ Sanchez denied having such a computer-generated document at the preelection conference or at any other time.

²⁴ During this conversation, according to Sanchez, he asked McNutt if Respondent would share the cost of the meeting room, and the latter said he would speak to his client.

²⁵ Also attending this meeting was T. D. Steinke, an International representative for the Union.

²⁶ There is no dispute as to this. Thus, Halbrook conceded that he, indeed, told Sanchez, at the initial bargaining session, "that Sivals would not provide any payment for any meeting room" as it "didn't feel . . . that it was our obligation to pay." Further, notwithstanding that Respondent's Odessa plant has a conference room, Halbrook did not believe there existed a "need" to meet on its property. He conceded that the foregoing, rather than being a philosophical position, was "just a bargaining strategy."

While refusing to pay for the cost of the meeting rooms, Respondent did pay for the cost of refreshments during the bargaining sessions. Apparently, this case was significantly less than the cost of the rooms.

²⁷ Sanchez testified that, during a subsequent telephone conversation, McNutt mentioned "that a utility company might provide us with a free meeting room but . . . he made no arrangements for the

Sanchez going through General Counsel's Exhibit 13, the complete contract proposal which he had mailed to McNutt prior to the meeting and with the latter asking questions and suggesting different language for several provisions. Specifically, Sanchez testified, McNutt stated that Respondent would have a written counteroffer as to management rights, that Respondent would not agree to arbitration of employee or contractual grievances ("He mentioned that a lot of employees would take two bites of the apple, that if they lost their arbitration case, that they would turn around and sue"), and that Respondent would not agree to include a dues-checkoff clause in any collective-bargaining agreement.²⁸ There is no dispute as to Respondent's position on the inclusion of dues-checkoff and arbitration provisions in a collective-bargaining agreement between the parties. Finally, Sanchez testified, the parties discussed the Union's unfair labor practice, which referred to the vacation policy and plant shutdown policy alleged unilateral changes found in the revised employee manual, which had been distributed to employees in October. In this regard, Sanchez said that Respondent should have given the Union an opportunity to discuss both matters prior to implementation, "and the answer I got from Mr. McNutt was that they had done that because the plant was old and it needed work on maintenance." Sanchez responded that the Company should restore the status quo and negotiate. The meeting ended with McNutt promising to mail counterproposals to the Union and contact Sanchez as to the next meeting.

As promised, on January 14, 1991, McNutt mailed to the union representatives Respondent's own contract proposal. The document (G.C. Exh. 14) differed from the Union's proposed collective-bargaining agreement in several significant areas. At the outset, it contained no dues-checkoff or arbitration provisions. With regard to management rights, Respondent's proposed language permits it to establish employee policies and practices and "from time to time, to change or abolish such policies," retains for it "the sole and exclusive rights to establish, change . . . or continue policies . . . relating to the testing, screening or analysis of its employees for drugs" and grants to Respondent "the sole and exclusive right to . . . implement, any change or changes deemed necessary to meet or equal (or to be able to remain competitive with) any . . . changes made effective or implemented by any . . . competitor," with such not subject to the contractual grievance procedure. Also, the contract proposal contained a no-strike, no-lockout provision, under which the Union's International would be liable for unauthorized, illegal strikes, and a limitations and waiver provision, under which Respondent retained control over any term and condi-

tion of employment not relinquished in the collective-bargaining agreement and the Union waived its right to bargain over matters not specified in the agreement. At last, according to Freddie Sanchez, included with the contract counterproposal, with the exception of some insurance material, was all of the information which had been requested by the Union since the prior August.²⁹ Subsequent to the receipt of the above material by Sanchez, he and McNutt spoke by telephone and arranged for the parties to again meet for bargaining on January 22 and 23.

As scheduled, the parties' next bargaining session occurred on January 22 at the Best Western Hotel in Odessa, with the Union paying for the cost of the meeting room. With the same participants as at the previous bargaining session present, most of the discussion concerned Respondent's counterproposal. The initial subject discussed was management rights, and Sanchez "strongly objected" to Respondent's language as being extremely restrictive and diminishing employees' rights; McNutt responded "that this is the way it had to be." With regard to the proposed grievance procedure language, Sanchez proposed changing "calendar days" to "working days" in the first section and, noting that there was no union involvement in the grievance procedure, proposed adding the words "the Union," in the second step, after the words "signed by the employee"; however, McNutt "didn't accept my counters." Turning to the waiver clause, Sanchez objected, arguing that it ought to be made subject to the grievance procedure, but McNutt refused to accept any such limitation. Sanchez further testified that, as to the no-strike, no-lockout language, he objected to the section that would have permitted a lawsuit against the International union for damages resulting from a strike or work stoppage in contravention of the contract clause; however, McNutt refused to expunge or change said language. According to Sanchez, the bargaining continued in this vein for the 2 days, with Respondent refusing to make any changes in its counterproposal.

As at each bargaining session, economics were discussed during this 2-day session, with each party indicating the importance of the subject. An economic package was included in Respondent's contract proposal, but Sanchez believed "there was nothing that was more than what they had before we started bargaining." To this, Respondent's representatives challenged Sanchez to determine if the economic package was not competitive with other Odessa area businesses. On the second day of the bargaining session, the union representatives presented a wage proposal (G.C. Exh. 15) including a "restoration pay" plan which, in effect, would have given all bargaining unit employees a \$2-per-hour wage increase retroactive to the day of the election. Respondent's reply was a succinct "no way." In testifying with regard to this 2-day bargaining session, Attorney McNutt did not dispute Sanchez' version of what was said and merely stated that the parties discussed Respondent's counterproposals and "how they related to the union's proposals." Also, according to McNutt, Respondent submitted to the union representatives copies of its drug testing program, health insurance plans, profit-sharing plan, and all other documents, included

meeting room." During cross-examination, while seemingly taking the position it was Respondent's obligation to do so, Sanchez conceded that he never contacted the utility company about the asserted availability of a room for bargaining at no cost.

²⁸ On dues checkoff, at a later bargaining session, according to Sanchez, McNutt "said that the company didn't want to know who was in the union and Mr. Halbrook said . . . he wasn't going to collect no money for the union." Attorney McNutt did not dispute this testimony, admitting that he told the union representatives that Respondent would not accept dues checkoff as it did not want to know the identities of those employees who desired the checkoff of dues and as it felt no "obligation" to check off any employees' union dues.

²⁹ It should be noted that the Union had filed an unfair labor practice charge, relating to Respondent's failure to transmit to the Union the requested information, in late November 1990.

in the Union's August 1990 request.³⁰ At the close of the session, the parties agreed to meet for bargaining over a 2-day period in early February.

Subsequent to the above-described bargaining session, International Representative Steinke mailed a counterproposal to Respondent's representatives. The document, General Counsel's Exhibit 16, appears to have been keyed to both the Union's complete contract proposal, General Counsel's Exhibit 13, and Respondent's counterproposal, General Counsel's Exhibit 14, and, listing each contractual article by subject, proposes deletions from or additions to Respondent's language or continuing the Union's language on a subject. Specifically, Steinke proposed the Union's language on management rights, no-strike, no-lockout, and on grievances; proposed deletion of Respondent's waiver provision; and continued the Union's demands for dues-checkoff and arbitration of grievances. As to Respondent's reaction, Attorney McNutt dismissed it as "addressing no one particular proposal as far as I could tell."

The parties scheduled their early February bargaining session for February 6 and 7 and met on those dates at the Best Western Hotel in Odessa, with the Union, as usual, paying for the cost of the meeting room, and, with Respondent's consent, the Union arranged for the presence of a Federal mediator. Sanchez testified that the bargaining proceeded with the basis being the Steinke counteroffer. As to management rights, each party continued proposing its own language, with McNutt saying Respondent would not alter its proposal, and, as to Respondent's waiver language, McNutt said that there would be no change. Further, according to Sanchez, Respondent continued to refuse to accept a dues-checkoff provision or arbitration of grievances; however, as to no-strike, no-lockout, McNutt stated that Respondent would agree to delete the portion of its proposed language which had permitted lawsuits against the International union in the event of unauthorized work stoppages and "keep it silent." Also, Sanchez again proposed but McNutt refused to alter Respondent's proposed grievance language by adding the Union as a signatory to employee grievances,³¹ and the

Union offered to reduce its "restoration pay" demand to \$1.50 per hour. To this, Respondent representatives said there would be no more money, with McNutt saying what was "in place" would remain. Drug testing, according to Sanchez, was a major issue during this bargaining session. Noting that Respondent's proposed management-rights language would have given unilateral control over this area to Respondent, Sanchez stated that he insisted upon the right to bargain over the subject; however, McNutt refused, saying, "this has been something implemented before the union had come in." Sanchez argued that the Union had the right to bargain over the choice of a testing laboratory, but McNutt said, "that it wasn't none of the union's business what lab was used." Finally, Sanchez demanded the opportunity to bargain over the standards used, with McNutt countering that these were already set forth in the employee manual. Another subject discussed by the parties, during this bargaining session, was the alleged unilateral change, set forth in the employee manual, concerning employee vacations during plant shutdowns. Sanchez testified that the subject was raised in the context of the unfair labor practice charge and that the employees' fear was loss of vacationtime during a plant shutdown. To this, McNutt said it was not Respondent's intent to take away any employee's vacation and proposed contractual language that vacations could be taken at any time but, in the event of a plant shutdown, any vacation taken during that time period would be without pay. According to Sanchez, the foregoing proposal was made in conversation between McNutt and employee Orbie Edson, who was present, he did not state his agreement, and, while loss of vacation was a concern, his "number one" concern was the unilateral nature of Respondent's change of policy in the above regard. While conceding that McNutt later "mentioned . . . [he] thought it was resolved but my . . . argument was that [Respondent] had implemented that without negotiating it first" and that the status quo should be restored.³² At the end of the 2 days of bargaining, according to Sanchez, "I believed that the company's proposals were not getting us anywhere but not at an impasse." He added that he remained willing to make counterproposals and that the Union was not at its final position. Notwithstanding his opinion as to the state of the bargaining, McNutt said "He would have the final offer at the next meeting."

James McNutt testified that, during the February 6 and 7 bargaining session, the parties discussed Steinke's counteroffer "in detail" and engaged in what the attorney described as "hard bargaining." With regard to management rights, the parties continued to adhere to their own proposals without change. As to the checkoff of union dues, McNutt says that he told the union negotiators that the Company did not want to know the identity of any employee who desired checkoff and that the Company did not feel it was obligated to help the Union collect dues. Concerning no-strike, no-lockout, according to McNutt, Respondent agreed to drop the lawsuit language, but "their position never changed. They wanted the union's . . . language." As to the grievance procedure, the Union's objection was that "[it] is not participating in the grievance procedure," but McNutt pointed out that the shop steward clause discussed participation by individ-

³⁰ Sanchez testified that all remaining documents, included in the August information request, were given to the Union at the next bargaining session and that, with said act, Respondent had finally complied with the Union's information request, 5-1/2 months late and after the filing of unfair labor practice charges regarding Respondent's conduct.

³¹ The record is confused on this point. During redirect examination, Sanchez asserted that, despite Steinke's counteroffer, during the February 6 and 7 session, he adopted Respondent's grievance language, retaining his demand for arbitration. Later, when asked to clarify if he, indeed, had accepted Respondent's grievance language without the insertion of the words "the Union" in the second section, Sanchez answered "no, I did not accept it." Later, the witness stated that he would have accepted Respondent's language if the words, "the Union" had been inserted in step 2, but "they didn't agree to that."

Adding to the confusing is the contradictory testimony of Respondent's witnesses on this point. Thus, while Attieson Halbrook testified that he recalled the Union proposing to insert the word "union" into step 2 of Respondent's grievance procedure language and the Company continuing to propose its original language, James McNutt specifically denied that Sanchez ever said he would accept Respondent's grievance language with the addition of the word "union" in the second step.

³² Employee Edson corroborated Sanchez that the Union never agreed to include the proposed vacation language in a contract.

uals in that position. As to the matter of vacations during periods of a plant shutdown, McNutt testified that the Union representatives expressed concerns, and “we said that would be fine; we would look at that, and came back and made a proposal to them that the union wrote down. . . . this is what we agreed upon, at least as far as I am concerned.”³³ Asked by me how the Union indicated agreement, McNutt answered that employee Edson said, “That sounded good to them.” Asked if Sanchez said anything, the attorney said, “He, as well as the other members, indicated that that sounded like . . . agreeable language” and said he had no changes to suggest. McNutt specifically denied that Sanchez stated he wanted the situation to return to the status quo, only saying the matter was an unfair labor practice and he could not talk about it. Summing up what had been accomplished during the 2 days with regard to the subjects in dispute, the attorney averred, “There had been really no movement, and it was beginning to be very obvious to me that as long as things stood the way they were, we were not going to be able to reach a middle ground.”³⁴

The parties’ next—and what proved to be the final—bargaining session between the parties was held on February 28 again at the Best Western Hotel. McNutt began by giving two documents to the union negotiators. The first, General Counsel’s Exhibit 17, was an outline of what was defined as Respondent’s “last, best, and final contract” proposal and, according to Sanchez, was framed as a response to the Union’s complete contract proposal and not to Steinke’s counteroffer. Accompanying this outline was the final offer in contract form, General Counsel’s Exhibit 18. Analysis of it discloses just two changes from Respondent’s initial contract proposal—deletion of the lawsuit language from the no-strike, no-lockout article and a change to “working days” in the grievance procedure. According to Sanchez, after examining the two documents, he said to McNutt that it did not appear as if there had been any changes from the Company’s initial proposal, and “Mr. McNutt said that it was their last, final offer. And I asked him if that was it, if they had no room to move, no more negotiating. And he said that was their last, best, and final.” Sanchez denied that McNutt ever mentioned the word impasse and stated that, when he asked if McNutt would negotiate on this document, the latter said, no. According to Sanchez, he termed the situation unacceptable and told McNutt to contact him if he “had any movement.” During cross-examination, Sanchez stated that he asked if Respondent was willing to negotiate from the Union’s proposal, and McNutt said, no, “that was it, zero,” and conceded that he made the comment he was “holding” on the Union’s proposals “because [McNutt] wouldn’t move off of any of [Respondent’s] proposals.”³⁵

Attorney James McNutt testified that, after presentation of General Counsel’s Exhibits 17 and 18 on February 28, a lengthy recess was taken during which the union representatives considered what Respondent had proposed and that,

upon returning, Sanchez “simply” said that “the union will stick with its proposals,” those of February 7. On this point, Attieson Halbrook quoted Sanchez as saying Respondent’s proposal was “not acceptable” and that the Union would stay with its own proposal. There is no dispute that the bargaining session ended at that point and that there have been no further meetings between the parties.

B. Analysis

Initially, I must consider the alleged violations of Section 8(a)(1) of the Act committed by Respondent prior to the August 10 representation election. In this regard, not only was I impressed by the testimonial demeanor of witnesses William Hudnall, Ernest Munoz, Gregory Perez, and Abel Cadena, each of whom appeared to be honestly recounting the preelection events, but also I note that the accounts of the management employees allegedly involved, Russell Cranson and Ed Greenlee, are rife with admissions as to many of the allegations and that, while testifying, neither seemed to be as candid as the above four witnesses. Accordingly, taking into consideration the respective admissions of Cranson and Greenlee, Hudnall, Munoz, Perez, and Cadena shall be credited as to their versions of the preelection conduct at issue herein. Specifically, I find that, early in the preelection period, Cranson approached Hudnall at the latter’s work station and asked him how the Union was going, said that Respondent would spend its last dollar to defeat the Union, and warned that there were “cases” which had extended for 15 to 17 years and that “they would never get a contract.” Utilizing the criteria found in *Rossmore House*, 269 NLRB 1176, 1178 (1984), and noting that the Union’s campaign was in its infancy and that, at this point, Hudnall had not yet exhibited overt support for the Union, I find that Cranson’s initial inquiry constituted unlawful interrogation. *Jakel Motors*, 288 NLRB 730, 732 (1988). Further, taken together, as I believe the comments were intended, Cranson’s comments that Respondent would spend its last dollar to defeat the Union, that there were “cases” which had extended for 15 to 17 years, and that “they would never get a contract” constituted nothing less than a warning that the employees’ organizing efforts and the possible selection of the Union as their collective-bargaining representative would be an exercise in futility.³⁶ *Atlas Microfilming*, 267 NLRB 682, 685–686 (1983). Hudnall had a second conversation with Cranson, in late June, during which the supervisor warned that Respondent would not “abide by” the employees receiving more money and better benefits with a union and that if Hudnall continued speaking to “anyone” about the Union, he would be fired. As with his comments regarding the extended time for bargaining, Cranson’s initial statement, during this conversation, conveyed the futility of selecting the Union as the employees’ bargaining representative and was blatantly violative of Section 8(a)(1) of the Act. *Atlas Microfilming*, supra. Moreover, Cranson’s latter comment, of course, constituted a threatened reprisal for union

³³ There is no dispute about the suggested language.

³⁴ Defending Respondent’s contract proposals, McNutt termed them “variations of the union’s initial proposal.”

As to what was being accomplished, McNutt stated that movement was “slow” at that meeting “but there was movement.”

³⁵ During recross-examination, Sanchez stated that this comment was made after a recess during which the union representatives studied Respondent’s final offer.

³⁶ I note, of course, that, after an initial specific denial, Cranson conceded that he had, in fact, made the comment to Hudnall that a company had dragged out negotiations with a union for 15 to 17 years, that he had initiated the conversation in this regard, and that his intent was to point out that the Union might never reach a contract with Respondent.

organizational activities and was clearly coercive and violative of Section 8(a)(1) of the Act.³⁷

Finally, Hudnall had a third conversation with his Supervisor Hudnall, 1 or 2 days before the representation election, during which the latter said that, immediately following the election if the Union won, “our benefits, our holidays, our vacations, our breaks—everything would be taken away. . . . we had no guarantees of anything; it would all be negotiable.” Counsel for the General Counsel is quite correct that such an explicit threat of reprisal immediately before a representation election, when all indications point to a close result, constitutes coercive conduct violative of Section 8(a)(1) of the Act.³⁸ While Hudnall quoted Cranson as saying that all benefits were negotiable after the election, the latter admitted that what he said regarding contract bargaining was that such would “have to start . . . from [the ground up].” Assuming such is what he said, in *Plastronics*, 233 NLRB 155, 156 (1977), the Board stated:

Depending upon the surrounding circumstances, an employer which indicates that collective-bargaining “begins from scratch” or “starts at zero” or “starts with a blank page” may or may not be engaging in objectionable conduct. . . . Such statements are objectionable when, in context, they effectively threaten employees with the loss of existing benefits and leave them with the impression that what they may ultimately receive depends in large measure upon what the Union can induce the employer to restore. On the other hand, such statements are not objectionable when additional communication to the employees dispels any implication that wage and/or benefits will be reduced during the course of bargaining and establishes that a reduction in wages or benefits will occur only as a result of the normal give and take of collective bargaining. . . . The totality of all the circumstances must be viewed to determine the effect of the statements on the employees.

Herein, Cranson’s statement was made in a context of a threatened loss of existing benefits if the Union won the election and absent any suggestion that bargaining is a process in which each side makes its own proposals, that requires mutual agreement, and where existing benefits may be traded away. Accordingly, Cranson’s above admission constitutes a

violation of Section 8(a)(1) of the Act. *Kenrich Petrochemicals*, 294 NLRB 519 (1989); *Mississippi Chemical Corp.*, 280 NLRB 413, 417 (1986).

In a comment similar to the foregoing, 2 weeks before the representation election, Supervisor Cranson told welder Ernest Munoz that, if the Union won the election, “they would take all benefits away, and just [because] they were bargaining didn’t mean they would come to an agreement, and that there was a company that had been bargaining for 17 years and never came to anything.” Cranson admitted telling employees about a company which had negotiated for 15 to 17 years without coming to a collective-bargaining agreement, and, for the reasons set forth above, Cranson’s comments conveyed both a threat of adverse consequences if the Union prevailed in the election and a warning of the futility of selecting a collective-bargaining representative and were, thereby, coercive and violative of Section 8(a)(1) of the Act. Further, during a conversation with welder Gregory Perez in late June, Cranson mentioned a competing company RAMA, saying that the Union campaign would “screw” things up, that if Union adherents were fired, they should not believe they can go to RAMA and be hired, and that Ronnie Dunn had spoken to RAMA officials and RAMA “doesn’t want you over there.” Cranson admitted that such a conversation “could have” occurred, and the supervisor’s comments constituted nothing less than a thinly veiled threat of termination for supporters of the Union and a warning that union supporters, who were discharged, would not be hired by Respondent’s competitor—statements blatantly violative of Section 8(a)(1) of the Act. Finally, during a conversation with welder Abel Cadena, 1 week before the election, after Cadena stated his belief that the union organizing campaign was bringing the employees together, Cranson averred that what it would do is “to shut the place down if the Union comes in.” Of course, such a threat of plant closure in retaliation for union organizational efforts was utterly coercive and violative of Section 8(a)(1) of the Act. *Jakel Motors*, supra at 732; *Coradian Corp.*, 287 NLRB 1207 (1988); *Atlas Microfilming*, supra at fn. 2.

With regard to Plant Manager Greenlee, I find that, just prior to the date of the election, Hudnall was called to the former’s office and that when Hudnall walked in, Greenlee asked him what his gripes were. After the employee mentioned his desire for a raise, Greenlee replied, “You think the Union is going to get you a raise. . . . that will never happen.” Later, the plant manager warned Hudnall to keep his mind on his own job and not “worry how much you are making or you are going to be fired.” The coercive effect of Greenlee’s statements is clear. Thus, by inquiring as to the employee’s “gripes,” the plant manager was unlawfully soliciting grievances, conduct violative of Section 8(a)(1) of the Act. *Permanent Label Corp.*, 248 NLRB 118 (1980). Further, Greenlee’s response to Hudnall’s expressed desire for a raise in pay (“that will never happen”), in the circumstances of this conversation, was clearly the plant manager’s expression of the futility of union organizing and was violative of the above section of the Act. Finally, in agreement with counsel for the General Counsel, the general manager’s threatened termination of Hudnall unless he kept his mind on his own job and stopped worrying about his wages appears to have been a veiled warning not to discuss rates of pay with other employees and is similar to his admitted warning to Frank

³⁷ Cranson’s version of his warning to Hudnall was initially that he should refrain from speaking about the Union “on company time” and then that he could speak about the Union at any time and “just not during working hours.” Assuming either of Cranson’s versions is credited, each would be violative of Sec. 8(a)(1) of the Act. Thus, inasmuch as the phrase “on company time” is “ambiguous as it could reasonably be interpreted to mean that an employee may not engage in solicitation or distribution at any time the employee is on the clock even at a time the employee had finished his work and is in a nonwork area,” it is “presumptively invalid and violative of Section 8(a)(1) of the Act.” *Florida Steel Corp.*, 215 NLRB 97, 98–99 (1974). Also, of course, the Board has long made it clear that “rules using ‘working hours’ are presumptively invalid because that term connotes periods from the beginning to the end of work-shifts, periods that include the employees’ own time.” *Our Way, Inc.*, 268 NLRB 394, 395 (1983); *Essex International*, 211 NLRB 749 (1974).

³⁸ Cranson admitted telling employees, prior to the election, that it was Respondent’s “prerogative” to do whatever it wanted if the Union was victorious.

Mendoza in late September. In this regard, the Board has held that “blanket” rules prohibiting salary discussion are unlawful, and I so find. *Mast Advertising & Publishing*, 304 NLRB 819 (1991); *L. G. Williams Oil Co.*, 285 NLRB 418 (1987). Also with regard to Greenlee, there is no dispute that, in July, outside of Russell Cranson’s office, he interrogated Gregory Perez as to why he wanted to be represented by a union. There is no evidence that Greenlee had any knowledge as to Perez’ union sympathies, and, in such circumstances, I find that interrogation to be violative of Section 8(a)(1) of the Act. *Jakel Motors*, supra at 732.

Turning from Respondent’s coercive and patently unlawful preelection conduct to its alleged retaliatory unilateral changes immediately after the August 10 representation election, in which the Union achieved a one-vote majority showing, I initially note that several witnesses including present employee Jeff Hamilton, Munoz, Hudnall, Cadena, Perez, and Frank Mendoza convincingly testified as to said allegations and corroborated each other in all significant details. I believe that, on these points, each testified candidly and shall be credited. In contrast, neither Cranson, Greenlee, or Attieson Halbrook impressed me as being particularly honest in testifying with regard to the two alleged retaliatory unilateral changes, and their respective testimony shall not be credited. Accordingly, as to the first of the allegations, regarding the taking of unfinished food and/or drink back to work stations after the 15-minute morning and afternoon break periods, I find that, at least for the several years preceding the August 10, 1990 election, employees in most, if not all, departments were permitted to take unfinished food or drink to their work stations at the conclusion of break periods and that, within a day or two of the Union’s victory, Respondent abruptly changed this practice, requiring employees to dispose of any unfinished food or drink at the conclusion of a break period rather than finishing such while they worked. As to the second of the alleged retaliatory unilateral changes, the record is clear that, prior to the election, paychecks were distributed to employees on Friday afternoons normally during the 2:30 p.m. break period and always before 3 p.m. Furthermore, and there is no dispute in this regard, on the Friday following the election, Cranson told employees that, pursuant to Greenlee’s orders, paychecks would not be distributed until, at least 5 p.m., and, on August 20, a notice was posted, informing employees of a “change” in Respondent’s payroll check distribution practice, with such occurring no earlier than the “quitting time” of each employee on Friday afternoons.³⁹

That both changes in employment practices, which Respondent concedes were accomplished without notice to the Union or affording it an opportunity to bargain prior to becoming effective, were implemented in retaliation for the Union’s victory in the representation election seems beyond question. Thus, both changes were implemented within days of the Union’s victory, and, of course, timing is a crucial consideration in assessing motivation. Further, both employment practices were apparently important to the employees.

³⁹ Respondent’s officials Greenlee and Halbrook contended that, despite the clear wording of the August 20 notice, what was done with regard to the new time for the distribution of payroll checks represented a “clarification” rather than a change in practice. Analysis of the record as a whole and of the wording of the notice itself convinces me of the baseless nature of their assertion.

Thus, the finishing of food and drink at work stations after break periods was a longstanding employment practice, and the delay in releasing payroll checks to employees until quitting time meant that employees no longer could cash checks at local banks until the following Monday. Finally, with regard to the change in the time of distribution of payroll checks, I specifically credit Gregory Perez that, in response to the complaints of employee Bill Burgess, Greenlee said, “I don’t give a damn about the union. You can do what I want.” “It is unlikely that the employees missed the import of [Respondent’s] ‘sudden’ action[s],” and I find clear record evidence that Respondent was unlawfully motivated in implementing these changes. *Speed Mail Service*, 251 NLRB 476, 477 (1980).

Following the dictates of the Board’s decision in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), approved in *NLRB v. Transportation Management Corp.*, 453 U.S. 989 (1983), which will be discussed in greater detail infra, in examining whether Respondent would have implemented either or both of these changes absent the employees’ selection of the Union as their representative for purposes of collective bargaining, I find that the record strongly mandates the conclusion that neither change would have been implemented absent the Union’s election victory. Thus, with regard to the change in the food and drink practice after break periods, Greenlee testified that food and drink were never permitted at work areas but conceded that taking food out of the breakrooms had been “an age old problem” and had occurred on a daily basis prior to the election. Further, as to the distribution of payroll checks, the policy, according to Greenlee, was not to do so until after 3 p.m. on Fridays, and the change in the time of such resulted from a “disruption” in the plant caused by employees, who received their paychecks early, walking out of the plant to give the checks to waiting wives. However, as above, he conceded that such had been an “on-going problem” during his tenure as plant manager, and there is no record evidence that the situation, in either instance, had worsened to the point of requiring immediate attention. Based upon the foregoing, there can be no doubt that any prohibition against taking food and drink back to work areas after break periods and the policy of not distributing payroll checks until after 3 p.m. on Fridays were honored almost exclusively in the breach and that Respondent was aware of and condoned such conduct. Accordingly, I find no merit in any contention that either of the above-described changes in employment practices would have been implemented absent the Union’s election victory and find Respondent’s retaliatory conduct to have been violative of Section 8(a)(1) and (3) of the Act. *Speed Mail Service*, supra.

The consolidated complaint alleges and counsel for the General Counsel argues that the above-described unilateral changes in employee working conditions also was violative of Section 8(a)(1) and (5) of the Act. “But not every unilateral change in work . . . rules constitutes a breach of the bargaining obligation. The change unilaterally imposed must, initially, amount to ‘a material, substantial, and a significant’ one.” *Peerless Food Products*, 236 NLRB 161 (1978); *Rust Craft Broadcasting of New York*, 225 NLRB 327 (1976). Perhaps if either of the two allegedly unlawful, unilaterally imposed changes had occurred in isolation and in circumstances free of surrounding unfair labor practices, a dif-

ferent result would be warranted. However, involved herein are two changes in employee terms and conditions of employment and, without regard to the innate significance of each, both were imposed in retaliation for the employees' vote in favor of union representation and in an atmosphere fraught with violations of Section 8(a)(1) of the Act. Furthermore, given Plant Manager Greenlee's comment that he did not "give a damn about the Union" and would do as he wished, the inference is warranted that Respondent deliberately ignored its obligation to bargain prior to implementing both changes. In the foregoing circumstances, having allowed its policies to "slip into desuetude," Respondent could not lawfully alter its past practices without offering to bargain with the Union, and I so find. *New York Telephone Co.*, 304 NLRB 183, 184 fn. 12 (1991).

Next, regarding the consolidated complaint allegations that Respondent discriminated against employee Frank Mendoza by transferring him from the welding to the painting and sandblasting department and by reducing his rate of pay, I note, at the outset, that the merits of said allegations are governed by the traditional precepts of Board law in Section 8(a)(1) and (3) cases, as modified by the Board's *Wright Line*, supra, decision. Thus in order to establish a prima facie violation of the above section of the Act, counsel for the General Counsel had the burden of establishing (1) that the alleged discriminatee engaged in union activities; (2) that Respondent had knowledge of or suspected such conduct; (3) that Respondent's actions were motivated by union animus; and (4) that the transfer of Mendoza and the reduction of his rate of pay had the effect of encouraging or discouraging membership in the Union. *WMRU-TV*, 253 NLRB 697, 703 (1980). Further, counsel for the General Counsel had the burden of proving the foregoing matters by a preponderance of the evidence. *Gonic Mfg. Co.*, 141 NLRB 201, 209 (1963). However, while the above analysis has been easily applied in cases in which a respondent's motivation is straightforward, conceptual problems arise in cases in which the record evidence discloses the presence of both lawful and unlawful causes for the respondent's acts. In order to resolve this ambiguity, the Board, in *Wright Line*, supra, established test in all Section 8(a)(1) and (3) cases involving employer motivation. "First, we shall require that the General Counsel make a prima facie showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct." *Id.* at 1089. The crucial inquiry, in cases such as this, is "not whether the Respondent could have [transferred Mendoza and reduced his rate of pay], but rather whether the Respondent would have done so in the absence of his protected activity." *Filene's Basement Store*, 299 NLRB 183 (1990).

Initially, with regard to the alleged discrimination against Frank Mendoza, there is no dispute that, in early September, he was temporarily assigned to the painting and sandblasting department at his current rate of pay and that, 2 weeks later, Respondent permanently transferred him to that department and reduced his rate of pay from \$10 to \$9 per hour. As to the merits of the allegations, counsel for the General Counsel argues, and the record establishes, that Mendoza participated in the initial union organizing campaign by attending meet-

ings, signing an authorization card, distributing such cards to other employees, and speaking to employees about the Union. While he appears not to have been a leader of said organizing campaign, there is record evidence to suggest that Respondent believed he acted in such a capacity. Thus, prior to the election, the alleged discriminatee complained to Plant Manager Greenlee about two union opponents who, rather than two other employees, were permitted to transfer to different jobs. Greenlee said he would investigate and get back to Mendoza. The next morning, Greenlee held an employee meeting and gave his explanation for the transfers and, after Mendoza objected to the plant manager for not speaking with him alone, Greenlee asked the alleged discriminatee to wait at the conclusion of the meeting. Crediting Mendoza,⁴⁰ I find that, when they met, Greenlee admonished Mendoza for his conduct at the meeting and that, after the latter defended his outburst, Greenlee said, "I don't have to talk to you to get to the Union." Mendoza asked if Greenlee was accusing him of being the "head man" in the campaign, and the latter replied "You are damn right I am."⁴¹ That Respondent appears to have believed that Mendoza was the leader of the Union's organizing campaign is corroborated by the fact that Attieson Halbrook spoke to him shortly before the election in order to point out that the Union's constitution provides that a member might go to jail for not paying "fees" to the Union. Halbrook conceded that he had such a conversation with Mendoza, that he asked Mendoza to tell other employees of the constitutional provision, and that Mendoza was the only employee to whom he spoke in this regard. Finally, if Respondent harbored any doubts as to Mendoza's role in the campaign, these undoubtedly were dispelled by his position as the Union's observer during the election.

Whether counsel for the General Counsel has established a prima facie violation of Section 8(a)(1) and (3) of the Act by Respondent for transferring Mendoza to the painting and sandblasting department and reducing his rate of pay depends upon the existence of record evidence establishing Respondent's above-described suspicions as its underlying motivation. In this regard, I have previously concluded that, prior to the election and in order to coerce employees from supporting the Union, Respondent engaged in conduct blatantly violative of Section 8(a)(1) of the Act, including implied and overt threats of reduced benefits and other reprisals, plant closure, and, most significantly, termination. Moreover, indicating that the foregoing were not meaningless comments and revealing of management's collective state of mind after the Union achieved majority status by just one vote, within days of the election, Respondent instituted two retaliatory, unilateral changes, clearly violative of Section 8(a)(1), (3), and (5)

⁴⁰ Generally, I found Mendoza to have been a more honest and candid witness than Ed Greenlee and shall credit him whenever the testimony of both conflicts. However, in light of the record as a whole and my perception of Greenlee as being an intelligent individual, I do not believe he uttered some of the comments attributed to him by the alleged discriminatee and shall not credit Mendoza as to those. On the latter point, it is, of course, not unusual for a trier of fact to believe some but not all of a witness's testimony.

⁴¹ Besides being indicative of Respondent's suspicions regarding Mendoza's role in the organizing campaign, Greenlee's comment was clearly coercive, creating the impression that Respondent was engaging in surveillance of the employees' protected concerted activities. *Gupta Permold Corp.*, 289 NLRB 1234, 1246 (1988).

of the Act. Further, at the time of Mendoza's permanent transfer to the painting and sandblasting department, Plant Manager Greenlee spoke to the alleged discriminatee, pointed to the personnel manual, and said that "discussing his wages or anybody else's was grounds for termination." Not only did Greenlee fail to explain to Mendoza the purpose of his warning but also, after the alleged discriminatee became angry, Greenlee told him "the best thing for you to do . . . is quit."⁴² The Board has long held that any interference with the free discussion of wage rate information restrains "employees in the exercise of their rights to engage in concerted activities." *Electronic Data Systems*, 240 NLRB 813, 816 (1979). Accordingly, in the absence of any showing of the necessity for such a rule, I find Greenlee's admitted threat of termination to Mendoza to have been violative of the Act. *Mast Advertising*, supra; *Electronic Data Systems*, supra. Also, in the circumstances, I believe that the plant manager's "invitation" to Mendoza to quit was nothing less than an unlawful, veiled threat of termination, violative of Section 8(a)(1) of the Act, and I so find. Accordingly, based upon the foregoing, and the record as a whole, there exists ample record evidence to conclude that Respondent believed that employee Frank Mendoza was a principal union adherent in the plant, that such was confirmed by Mendoza's position as the Union's observer during the election, and that Respondent harbored unlawful animus toward its employees generally because of their support for the Union and toward Mendoza specifically as a result of his perceived leadership role in the election campaign. Accordingly, I find that counsel for the General Counsel has established a prima facie violation of Section 8(a)(1) and (3) of the Act by Respondent's transfer of Frank Mendoza from a position of material dispatcher in the welding department to a position of sandblaster in the painting and sandblasting department and reduction of his rate of pay.

In accord with the *Wright Line* analytical approach, the burden shifted to Respondent to demonstrate, as an affirmative defense, that, notwithstanding the existence of unlawful motivation for such, Mendoza would, nevertheless, have been transferred to the painting and sandblasting department, initially, on a temporary basis and, later, permanently. At the outset, there can be no question that Respondent faced a manpower shortage in this department in early September and that workers were needed. Thus, with the department's supervisor on vacation, only two employees, a painter-coater and a sandblaster, remained to perform all the required work, and, 2 days after the supervisor's vacation began, the painter-coater, Jose Galindo, became injured and unable to work. With just a sandblaster employee remaining, Respondent transferred Mendoza into the painting and sandblasting department on a temporary basis. Given the record evidence that, at least, 10 percent of the bargaining unit employees had painting and/or sandblasting experience, the issue, with regard to the instant matter, is whether the selection of Mendoza was reasonable under the circumstances. Initially, as pointed out by counsel for the General Counsel, Mendoza had only 2 days' experience in painting and sandblasting, 3

years before in 1987; however, there is no evidence that any other employee had more experience. Moreover, Ed Greenlee's testimony was uncontroverted that there was no other experienced employee available. According to him, no welder could be spared as each was working on a job, and there were no employees available in other departments. On this point, the fact that other employees may have had some painting and sandblasting experience does not mean that any were available for transfer, and counsel for the General Counsel proffered no evidence on the point. Next, counsel for the General Counsel argues that, with only a sandblaster available in the painting and sandblasting department, why would Respondent transfer an employee (Mendoza), whose only experience was sandblasting work, when what was needed was an employee who could perform painting work. While none of Respondent's witnesses addressed this point, I note that, within days of Galindo's injury, supervisor Ortiz returned to work and, within a week of Mendoza's transfer, a painter and a painter-coater were hired. Further, counsel's argument presupposes that there was no work for a sandblaster employee at the time of Mendoza's temporary transfer, and neither Mendoza nor any other employee testified that there was no available work for the alleged discriminatee.

Two weeks after his temporary transfer, Mendoza's transfer to the painting and sandblasting department was made permanent. On this point, Greenlee and Cranson testified that a sandblaster was still required in that department and that an analysis of the work in the welding department disclosed that work there could be accomplished without an individual acting as a material dispatcher and that whatever work was performed on a daily basis by Mendoza could be performed by the Supervisor Cranson without affecting the efficiency of the welding department. The only testimony, proffered to controvert Respondent on these points, was that of William Hudnall. However, unlike his appearance as a witness when testifying as to Respondent's unlawful conduct described above, Hudnall appeared to be significantly less candid and generally unconvincing in describing what he asserted was increased work and less efficiency as a result of Mendoza's absence from the welding department. I cannot credit him over Cranson and Greenlee on this issue. In short, I believe that Respondent has met its burden of proof and find that it would have transferred Mendoza to the painting and sandblasting department notwithstanding his union activities.

However, a different result is mandated when considering the reduction of Mendoza's pay from \$10 to \$9 per hour at the time of his permanent transfer. In this regard, Respondent's only justification for doing so was Plant Manager Greenlee's assertion that, when an employee is permanently transferred from one department to another, he can be paid no more than the highest paid in the new department. Analysis of the record as a whole convinces me that said explanation was an utter canard. Thus, when initially asked if any other permanently transferred employee ever had his wage rate reduced, Greenlee said, no; however, he later changed his testimony, saying "several years" before, another employee had suffered a wage rate reduction but offered no corroboration. Moreover, his testimony, during cross-examination on this point, seemed labored and confused. Thus, while the point of his direct testimony was the necessity of reducing Mendoza's wage rate to avoid "dissension" in the paint-

⁴² There is no dispute that the foregoing conversation occurred. In determining what was said, I have credited the admission of Greenlee and that portion of Mendoza's testimony which best comports with the record as a whole.

ing and sandblasting department, his emphasis during cross-examination was that Mendoza does “very little” painting and that “he can’t do what [that] classification says.” Adding to my difficulty with Respondent’s proffered explanation is the fact that there is no wage scale for sandblaster and the painter scale ranges up to \$11 per hour. Finally, and most significantly, Greenlee conceded that Mendoza was a long-term and valued employee and that a determination of his wage rate at the time of the transfer was solely within Respondent’s discretion. The foregoing, and the record as a whole, convinces me that Respondent seized upon the necessity of transferring Frank Mendoza to the painting and sandblasting department to concomitantly reduce his wage rate as punishment for his perceived role in the Union’s successful organizing campaign. I find that, in so acting, Respondent engaged in conduct violative of Section 8(a)(1) and (3) of the Act.

Next, I turn to the matter of Respondent’s employee drug testing policy, specifically whether Respondent was under a legal duty to have offered the Union an opportunity to bargain prior to implementing the use of Harrison & Associates Forensics Laboratories to conduct the drug testing. The basic facts, regarding Respondent’s drug testing program, are not in dispute. Thus, after preliminary discussions with Roy Harrison and prior to any union organizing activity among its employees, on May 1, 1990, Respondent implemented a comprehensive employee drug testing policy, with such becoming effective in 90 days. At approximately the same time, Respondent informed Roy Harrison that his company would be utilized to perform the drug testing; however, the record establishes, and I find, that no contract between the parties existed for such purpose at that time. Rather, no contract between the parties was reached until Respondent contacted Harrison to actually perform the drug tests of its employees, and, in this regard, given Attieson Halbrook’s admission, I find that this occurred “after the election.” Finally, there is no dispute that Respondent neither notified the Union nor gave it an opportunity to bargain prior to contracting with Harrison. In these circumstances, counsel for the General Counsel, while not arguing that Respondent was under any obligation to bargain with the Union with regard to the implementation of its drug testing plan, does contend “that the selection of the laboratory to perform drug tests is a matter so integral in the implementation of a drug testing program that it must necessarily be considered a mandatory subject of bargaining” and, therefore, Respondent was obligated to have given notice to, and offered to bargain with, the Union prior to contacting the testing laboratory regarding the commencement of the employee drug testing. Arguing to the contrary, counsel for Respondent makes two main points. First, citing *Ford Motor Car Co. v. NLRB*, 411 U.S. 488 (1979), he contends that the selection of the company to perform the drug testing was a mere “managerial decision” which involved the inherent right of an employer to conduct business with whomever it desires, and, next, he argues that the testing laboratory was simply the “means” by which Respondent implemented its drug testing procedure and, accordingly, was not itself a mandatory subject of bargaining.

There is no dispute that drug and alcohol testing programs and policies constitute mandatory subjects of bargaining and that unilateral implementation of such testing, without affording a bargaining representative with prior notice and an oppor-

tunity to bargain normally is violative of Section 8(a)(1) and (5) of the Act. *Johnson-Bateman Co.*, 295 NLRB 180 (1989). While the instant issue has not yet been resolved by the Board, analysis of the record as a whole convinces me that, given the important legal rights involved, including employees’ rights to privacy and against self-incrimination, and such important considerations as the competency of those administering the tests and analyzing the results, the accuracy of the tests, the “chain of custody” of the urine samples, and the confidentiality of the results, the laboratory utilized to performed the testing, constitute the single most critical aspect of any alcohol and drug testing program and, likewise, must be found to be a mandatory subject of bargaining. Herein, notwithstanding implementation of the overall program and its effective date occurring at a time when no bargaining obligation existed, as the contractual relationship between Respondent and Harrison & Associates Forensic Laboratories was reached subsequent to the attainment of majority status by the Union, thereby making possible the choice of another testing laboratory, I believe that, at the least, bargaining was required over the decision to use the services of the laboratory. In arguing against a bargaining obligation, counsel points to the timing device in *Rust Craft Broadcasting of New York*, 225 NLRB 327 (1976), and the oral tests in *UNC Nuclear Industries*, 268 NLRB 841 (1984), and, as the Board did not require bargaining over the decision to use with and found the introduction of the timing devices within “managerial control,” argues that bargaining should not be required over the choice of a testing laboratory. Contrary to counsel, both of the cited cases involve asserted unilateral changes and, in particular, whether such were material, substantial, or significant. In neither instance was the Board required to decide an employer’s bargaining obligation in the absence of any existing practice or to consider whether bargaining is required prior to implementation of an integral aspect of a policy which itself constitutes a mandatory subject of bargaining but over which, in the circumstances, bargaining was not required. Moreover, neither the choice of a timing device nor the use of a particular testing procedure involves the complex legal issues inherent in the choice of a drug testing laboratory and their impact upon employee rights. Accordingly, the above-cited cases appear to be inapposite and counsel’s analogy to the factual circumstances of both is without merit. With regard to the *Ford Motor Co.* argument, other than counsel’s assertion of an inherent right to conduct business with whomever it desires, Respondent offered no evidence that the choice of a drug and alcohol testing laboratory involved the commitment of investment capital or the changing of the scope or nature of its business enterprise. Rather, choosing such a laboratory appears to be a more limited decision involving employees’ terms and conditions of employment and is a mandatory subject of bargaining. In these circumstances, and inasmuch as Respondent’s contract with the testing laboratory was consummated subsequent to the election, I believe a bargaining obligation existed, and by failing to give the Union prior notice of its intent to contract with Harrison & Associates Forensic Laboratories and an opportunity to bargain regarding the choice of said testing laboratory, Respondent engaged in conduct violative of Section 8(a)(1) and (5) of the Act.

Regarding the alleged unlawful, unilateral changes which were implemented by Respondent in its revised employee policy manual, distributed to bargaining unit employees in October 1990, there is no dispute as to the basic facts. Thus, Respondent concedes that it did not offer the Union an opportunity to bargain about any changes in employment practices found in said manual. Moreover, the record evidence was uncontroverted that changes in employees' terms and conditions of employment were, in fact, implemented by said manual, including a new provision that the plant "will" be closed for 2 weeks for maintenance and requiring vacations to be taken during said time, a provision giving employees 1 hour of unauthorized leave, rather than, as set forth in the prior manual, 1 hour of paid leave, in order to vote, and the deletion of the material dispatcher job classification.⁴³ There is no contention that the foregoing changes were, in any manner, not material, substantial, and significant. In these circumstances, these departures from past employment practices, without affording the Union notice and an opportunity to bargain prior to implementation, constituted a violation of Section 8(a)(1) and (5) of the Act. *Union Child Day Care Center*, 304 NLRB 517 (1991); *Murphy Oil USA*, 286 NLRB 1039 (1987).

Turning to the Union's request for information and the consolidated complaint allegation that Respondent unlawfully failed and refused to provide the Union with the requested information, there is no factual dispute herein that, by a letter dated August 24, 1990, the Union requested that Respondent provide it with the names, ages, dates of hire, rates of pay, job classifications, average weekly hours worked, and fringe benefits for all bargaining unit employees; that, over the following 5 months, Freddie Sanchez reiterated this request, on numerous occasions, verbally, during telephone conversations and at bargaining sessions, and in writing; that not until January 14, approximately 6 weeks after the Union filed an unfair labor practice charge over Respondent's failure to honor its request, did the latter provide any of the requested information to the Union; and that Respondent did not completely comply with the Union's request for information until the parties' bargaining session, held on January 22 and 23, 1991. Inasmuch as Sanchez conceded at the hearing that, as of the above bargaining session, all the requested information had been provided, counsel for the General Counsel now contends that Respondent did not satisfy its obligation to provide information as such was not done with "reasonable dispatch" and that delay was unreasonable and unlawful. Initially, "an employer has statutory obligation to supply requested information that is potentially relevant and will be of use to a union in fulfilling its responsibilities as the employees' exclusive bargaining representative." *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435-436 (1967); *Pennsylvania Power Co.*, 301 NLRB 1104, 1105 (1991). Herein, the Union's information request was for information relating di-

rectly to the bargaining unit employees, and "information concerning wage rates, job descriptions, and other information pertaining to employees within the bargaining unit is presumptively relevant." *Pennsylvania Power*, supra. Further, not only does an employer have a duty, within the meaning of Section 8(a)(1) and (5) of the Act, to provide such information to the bargaining representative but also an employer has a concomitant statutory obligation to furnish the information without unreasonable delay and in a reasonable time. *Westmoreland Coal Co.*, 304 NLRB 528 (1991); *Accurate Auditors*, 295 NLRB 1163 (1989). Herein, despite repeated reiterated requests, 5 months passed before Respondent felt compelled to furnish the above-described information to the Union. The only justification for delay was Attieson Halbrook's assertion that he observed Freddie Sanchez at the preelection conference with a confidential computer-generated payroll document, containing much, but not all, of the requested information, with such leading to the former's conclusion that the Union possessed the requested information. Sanchez denied Halbrook's assertion, and, as between the two witnesses, I found Sanchez to have been significantly more candid and forthright than Halbrook, there is no record evidence justifying or even explaining Respondent's conduct in this regard. Accordingly, I find that Respondent unreasonably delayed in furnishing the requested information to the Union and, thereby, engaged in conduct violative of Section 8(a)(1) and (5) of the Act.

Before discussing what appears to be the most important of the issues herein, those relating to the bargaining between the parties and, in order to properly understand Respondent's attitude toward bargaining, I believe it necessary to reflect upon Respondent's conduct to this point. In this regard, analysis of the record as a whole convinces me that Respondent's above-described acts were calculated to achieve two principal objectives. First, in light of the unlawful retaliatory unilateral changes implemented immediately after the election, it seems clear that Respondent was bent upon ensuring that its preelection threats came true and punishing the employees for their selection of the Union as their exclusive bargaining representative. That this view is the proper one is made certain by Respondent's discriminatory reduction of Frank Mendoza's wage rate, an act of obvious retaliation against a suspected leader of the Union's successful campaign. The second objective of Respondent's acts and conduct is no less certain—the denigration of the Union, which had achieved its majority status by a margin of one vote, in the eyes of bargaining unit employees in order to demonstrate to them the futility of their selection and to provoke some employee action beyond the certification year. That such an inference from the record may be drawn is clear given Respondent's seeming blatant disregard for its bargaining obligations as described above, and, in this regard, I note that two of said unlawful acts, the unilaterally implemented changes in employees' terms and conditions of employment, announced in the revised employee manual, and the failure to furnish requested information to the Union, continued during the contract negotiations between the parties.

In this context, I turn to consideration of the issues involving the actual contract negotiations between Respondent and the Union, bargaining which entailed six negotiating meetings, two of which were 2-day sessions, over a 4-month period. In support of the consolidated complaint allegation that

⁴³ Contrary to counsel for the General Counsel, the provision, stating that employees must return from vacation, if necessary, for the convenience of Respondent, does not appear to be a new policy. Thus, while the language did not appear in the previous employee manual, the employment practice seems to have been announced to bargaining unit employees in December 1981 and set forth thereafter in the supervisors' policy manual, which is available to employees. In these circumstances, I do not believe such can be considered to be a change in employees' terms and conditions of employment.

Respondent engaged in bad-faith, surface bargaining in violation of Section 8(a)(1) and (5) of the Act, counsel for the General Counsel argues that the bargaining conclusively establishes that Respondent evidenced no "intention or desire" of reaching a final agreement with the Union. Arguing to the contrary, Respondent's counsel asserts that what occurred was no more than the "hard bargaining" which must be "expected" in light of an election decided by one vote. In reaching conclusions as to what occurred during the bargaining, I have relied upon the testimony of Freddie Sanchez. While I was not convinced of his candor on every aspect of the bargaining, he appeared to be a far more honest and truthful witness than either Attieson Halbrook or James McNutt, each of whom failed to impress me as being entirely candid and contradicted the other on material aspects of the bargaining.

At the outset, I must state that, normally, whether an employer's conduct, during contract negotiations with a union, evidences bad-faith surface bargaining is not an easy decision. Viewed in a vacuum, one finds herein an initial listing of 14 bargaining demands, a draft agreement incorporating said demands, an economic proposal, and a counterproposal submitted by the Union; an initial draft contract proposal and a final offer submitted by Respondent; bargaining between the parties during which each side adamantly adhered to its original positions as to the subjects at issue herein (management rights, waiver, dues checkoff, and arbitration); concessions made by the Union as to economics; and concessions by Respondent on an aspect of its proposed no-strike clause and in its proposed grievance provision; and no statements by any of Respondent representative revealing an intent not to bargain in good faith. Taking a more expansive view, counsel for the General Counsel requests that I view Respondent's acts and conduct at the bargaining table in the context of its entire course of conduct both before and after the election, which manifestly establishes an intent to eviscerate the Union, and specifically argues that Respondent's insistence, while refusing to permit the bargaining to take place in a conference room at the plant, that the Union bear the entire cost of the meeting rooms and its management rights, waiver, and no-strike proposals, viewed separately or in combination, and dues checkoff and arbitration positions establish that Respondent bargained with the object of forestalling any final agreement.

I find merit in counsel for the General Counsel's positions that what occurred at the bargaining table must be viewed in the context of Respondent's acts and conduct away from the table and that the substance of Respondent's bargaining proposals and positions may be indicative of its intent. "In determining whether a party has bargained in good faith, making a genuine effort to reach agreement, [the Board] will seldom find direct evidence of a party's intent to frustrate the bargaining process. Rather, [it] must look at all of [the party's] conduct, both away from the bargaining table and at the table, including the substances of the proposals on which the party has insisted. . . . Such an examination is not intended to measure the intrinsic worth of the proposals, but instead to determine whether, in combination and by the manner in which they are urged, they evince a mindset open to agreement or one that is opposed to true give-and-take." *NLRB v. A-1 King Size Sandwiches*, 732 F.2d 872, 874 (11th Cir. 1984); *NLRB v. Mar-Len Cabinets*, 659 F.2d 995, 999 (9th

Cir. 1981); *Hydrotherm, Inc.*, 302 NLRB 990 (1991); *Prentice-Hall, Inc.*, 290 NLRB 646 (1988); *Reichhold Chemicals*, 288 NLRB 69 (1988). Further, certain conduct, such as unilateral changes in mandatory subjects of bargaining, has been held to be indicative of a lack of good faith. *Atlanta Hilton & Tower*, 274 NLRB 1600, 1603 (1984). Herein, of course, I have found that Respondent unilaterally implemented changes in the bargaining unit employees' terms and conditions of employment, announcing some immediately after the August 10 election and others in the revised employee manual published in October 1990.

As another indicia of Respondent's bad-faith approach to the contract negotiations, counsel for the General Counsel points to Respondent's refusal to permit bargaining to occur in the conference room at the plant while, at the same time, refusing to share the cost of a meeting room away from the plant. There is no dispute as to these facts, and Halbrook, as to the former, stated that Respondent's refusal to bargain on its property was "just a bargaining tactic" and, as to the latter, stated that Respondent felt no "obligation" to share the cost of the meeting room. In the circumstances of this case, I agree with counsel for the General Counsel that Respondent's conduct, in this regard, not only was indicative of bad-faith bargaining but also was itself unlawful. At the outset, I note that the Board does not take a per se approach to where bargaining should take place but rather considers "all the relevant circumstances." *Tower Records*, 273 NLRB 671, 672 fn. 8 (1984). It has long been a standard tenet of labor law that bargaining should occur, if possible, at the location of the dispute or controversy. *NLRB v. P. Lorillard*, 117 F.2d 921, 924 (6th Cir. 1941). Herein, notwithstanding that the hotel, at which the bargaining occurred, is no more than 5 miles from the plant, Respondent offered no explanation for refusing to hold the contract bargaining at the plant other than its pejorative comment that such was a mere bargaining stratagem. Moreover, of course, having forced the bargaining away from the plant, Respondent refused to share the expense of the room as it did not feel "obligated" to do so. In these circumstances, it can hardly be said that "legitimate needs" influenced Respondent's conduct. *Burns Security Services*, 300 NLRB 1143 (1990). Further, such distinguishes the instant matter from *McCulloch Corp.*, 132 NLRB 201, 205 (1961), wherein no violation was found in an employer's refusal to meet at its plant due to a bitter election campaign. Also, in *McCulloch*, the respondent shared the cost of the meeting location. In these circumstances, in light of the record as a whole, it is evident that Respondent's tactic was designed to increase the bargaining pressure upon the Union and seems to be a patent example of Respondent's effort to forestall agreement. Accordingly, it must be found that Respondent acted in bad faith by its foregoing conduct and in violation of Section 8(a)(1) and (5) of the Act.⁴⁴

In the context of Respondent's flagrant unfair labor practices, including those indicative of bad-faith bargaining, I consider the substance of its bargaining proposals and positions. Initially, it is important to note that, even in the ab-

⁴⁴ The fact that Freddie Sanchez failed to follow up on Respondent's lead regarding a local utility's offer to provide a room at no cost does not detract from my finding. Thus, such, of course, has nothing to do with Respondent's bad faith, and, in any event, it was not unreasonable for Sanchez to have believed that it was Respondent's obligation to contact the utility.

sence of a collective-bargaining agreement, a bargaining representative enjoys significant rights under the Act simply by virtue of its exclusive representative status. *Hydrotherm*; *Prentice-Hall*, supra. These rights include the rights to strike and to negotiate over grievances and the right to be notified and to be afforded an opportunity to bargain, in advance, over proposed changes in bargaining unit employees' terms and conditions of employment. Furthermore, there can be no doubt that a labor organization may trade away or accept weakened versions of these rights in order to obtain concessions in other areas from an employer. In my view, therefore, the issue, with regard to Respondent's contractual proposals, is whether, alone or in combination, these clauses restricted the Union's majority representational rights to the degree that bargaining was rendered futile. The starting point for this analysis must be Respondent's proposed management rights article, which, on its face, permits Respondent to establish personnel policies and practices and, "from time to time" change or abolish them and to implement any changes in its employees' terms and conditions of employment in order to meet, equal, or remain competitive with any competitor, with any such changes not subject to the grievance procedure. While an employer may lawfully propose a management-rights clause, clearly, the effect of such language would emasculate the Union's representative rights by permitting Respondent to unilaterally change terms and conditions of employment with impunity whenever it so desired. That such language was offered in bad faith seems apparent but becomes manifest when the clause is viewed in combination with others. Thus, while noncompetitive unilateral changes may be subject to the grievance procedure, the latter only encompasses managerial review of grievances. Further, Respondent would not even contemplate the inclusion of a third party arbitration procedure for grievances. Meanwhile, the proffered no-strike clause would prohibit strikes in support of any grievance, and the proposed waiver language would not permit the Union to demand bargaining over any subject not specified in the collective-bargaining agreement. The net effect of said provisions would be to leave Respondent with unfettered control over the bargaining unit employees' terms and conditions of employment and permit it to act as if the Union did not exist and in derogation of the Union's fundamental status as the employees' bargaining representative. In my view, the Union and the employees would have been better off had they not gone to the bargaining table and merely relied upon the Union's representational status under the Act. *A-1 King Size Sandwiches*, supra at 855. Clearly, then, these contract provisions and positions were offered in bad faith in an effort to stifle bargaining⁴⁵ and impede any

⁴⁵ In arguing that what occurred was nothing more than "hard bargaining" on an initial contract, Respondent points to the fact that the Union demonstrated adamant positions on its own proposals for management rights, grievance and arbitration, no-strike, waiver, and checkoff. However, it is evident from the credible evidence that it was Respondent's own intransigency that prompted the Union's lack of movement. Thus, I credit Sanchez that, at the February 28 bargaining session, he stated that the Union was "holding" on its proposals in response to the fact that attorney McNutt stated that Respondent would not move from what was termed its final offer. Also, I note that Respondent demonstrated this identical attitude at an earlier date. Thus, at the January 22 bargaining session, at which time Respondent presented its initial proposal to the Union, during

change of agreement, a conclusion made certain by the surrounding pattern and practice of unfair labor practices by Respondent. *Prentice-Hall*, supra at 671. Further, of course, without regard to the unreasonable effect of these proposals, the Board has "consistently found bad-faith bargaining and a violation of the Act in cases, such as herein, in which an employer has insisted on a broad management-rights clause and a no-strike clause during negotiations, while, at the same time, refusing to agree to an effective grievance and arbitration procedure." *San Isabel Electric Services*, 225 NLRB 1073, 1079 fn. 7 (1976). In sum, as the Board stated in *Hydrotherm, Inc.*, supra "In sum . . . Respondent's proposals, considered as a whole, would have left the employees and their representatives with less than they would enjoy by simply relying on their certification, without a contract. This is not the conduct of an employer sincerely attempting to reach an agreement, and it is not good faith bargaining." Rather, when placed in the context of the egregious unfair labor practices previously found, it makes patently obvious the conclusion that Respondent never understood the seriousness of a collective-bargaining relationship and was doing all it could to avoid its legal obligations—with the undoubted aim of waiting for the passing of the Union's certification year. *NLRB v. Overnite Transportation Co.*, 938 F.2d 815 (7th Cir. 1991). By its above-described conduct,⁴⁶ Respondent engaged in bad-faith surface bargaining in violation of Section 8(a)(1) and (5) of the Act. *Hydrotherm*, supra; *Prentice-Hall*, supra.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(6) of the Act.
3. The Union is the certified bargaining representative of Respondent's employees in the following appropriate unit:

the discussion of Respondent's management-rights language, when Sanchez objected that the clause diminished employee rights, McNutt rejected any objections, saying "that this is the way it had to be."

Respondent's counsel also points out that Respondent did make two concessions to the Union in its final offer. While this is true, I note that the concession in the no-strike language, while not insignificant in itself, left the basic language of the proposal in tact—without regard for the fact that Respondent would not agree to arbitration.

⁴⁶ The consolidated complaint also alleges that Respondent's refusal to agree to the inclusion of a dues-checkoff provision in a collective-bargaining agreement was not only an indicia of bad faith but also unlawful itself. In this regard, the Board has long held that an employer is not required to accede to a Union's demand for a dues-checkoff provision. *Litton Microwave Cooking Products*, 300 NLRB 324 (1990); *Tritac Corp.*, 286 NLRB 522 (1987). Herein, Respondent perfunctorily rebuffed the Union's proposal of a dues-checkoff provision, asserting that it was not "obligated" to do so and that it did not want to know the identities of union members. Inasmuch as Respondent gave no reasonable business justification for its refusal to accept such a provision and, in the context of its clear bad-faith approach to bargaining, the conclusion is warranted that, in these circumstances, Respondent's absolute refusal to consider dues checkoff amounted to bad-faith bargaining in violation of Sec. 8(a)(1) and (5) of the Act, and I so find. *Stevenson Brick Co.*, 160 NLRB 198, 210 (1966).

All production and maintenance employees employed by the Employer at its Odessa, Texas facility, who were employed during the payroll period ending July 6, 1990; excluding all office clerical employees, guards and supervisors as defined by the Act.

4. Respondent committed the following acts and conduct violative of Section 8(a)(1) and (5) of the Act:

a. Engaging in bad-faith, surface bargaining with no intention of entering into any final or binding collective-bargaining agreement.

b. Refusing to consider the inclusion of a dues checkoff in any final collective-bargaining agreement with the Union.

c. Insisting upon a broad management-rights clause and a no-strike provision in any final collective-bargaining agreement with the Union while, at the same time, refusing to consider the inclusion of any arbitration procedure.

d. Refusing to engage in collective bargaining with the Union at its plant while, at the same time, refusing to share the cost of any meeting site away from the plant.

e. Unreasonably delaying in the furnishing of information, necessary and relevant for collective bargaining, to the Union.

f. Unilaterally, and without giving prior notice to the Union or affording it an opportunity to bargain, implementing changes in the bargaining unit employees' terms and conditions of employment, as set forth in a revised employee policy manual, including a new provision that the plant "will" be closed for 2 weeks for maintenance and requiring vacations be taken during said time period, a provision giving employees 1 hour of unauthorized leave in order to vote, and the deletion of the material dispatcher job classification.

g. Failing to give to the Union prior notice of its intent to contract with Harrison & Associates Forensic Laboratories and afford the Union an opportunity to bargain over the choice of said testing laboratory to conduct drug and alcohol tests of bargaining unit employees.

5. Respondent engaged in conduct violative of Section 8(a)(1), (3), and (5) of the Act by, unilaterally, without giving prior notice to or affording the Union an opportunity to bargain, and in retaliation for their support for the Union in the election, implementing changes in bargaining unit employees' terms and conditions of employment, including no longer permitting food or drink to be taken back to work areas after the conclusion of break periods and changing the time for the distribution of payroll checks.

6. Respondent engaged in conduct violation of Section 8(a)(1) and (3) of the Act by reducing the rate of pay of employee Frank Mendoza, after transferring him to the painting and sandblasting department, in retaliation for his perceived leadership role in the Union's organizing campaign.

7. Respondent engaged in the following acts and conduct violative of Section 8(a)(1) of the Act:

a. Interrogating employees about their own union activities and sympathies and those of their fellow employees.

b. Warning employees that their organizing efforts and selecting the Union as their bargaining representative would be an exercise in futility.

c. Threatening reprisals against employees for their organizing efforts and if they selected the Union as their bargaining representative.

d. Warning employees that, if they selected the Union as their bargaining representative, contract bargaining would have to start from the ground up and could drag on for 15 to 17 years without any agreement.

e. Threatening employees with termination because of their support for the Union.

f. Threatening employees with plant closure, loss of benefits, and other reprisals if the employees selected the Union as their bargaining representative.

g. Soliciting grievances and "gripes" from employees in order to induce them to abandon their support for the Union.

h. Threatening employees with termination for discussing their rates of pay or salary with fellow employees.

i. Creating the impression of surveillance of employees' protected concerted activities.

8. The aforementioned unfair labor practices have a close, intimate, and adverse effect on the free flow of commerce within the meaning of Section 2(2) and (7) of the Act.

REMEDY

I have concluded that Respondent has committed numerous serious unfair labor practices within the meaning of Section 8(a)(1), (3), and (5) of the National Labor Relations Act. Accordingly, I recommend that Respondent be required to cease and desist therefrom and to take other affirmative actions designed to effectuate the purposes and policies of the Act. At the outset, having found that Respondent implemented several changes in the bargaining unit employees' terms and conditions of employment in utter disregard of its statutory obligation to give prior notice to the Union and afford it the opportunity to bargain, upon request, over the prospective changes, I shall recommend that Respondent be ordered to rescind each of the unlawful unilateral changes and to restore the status quo conditions which existed prior to the implementation of them. In particular, Respondent shall be required to rescind the changes in its payroll check distribution and break period practices which were implemented after the election, to cease utilizing the services of Harrison & Associates Forensic Laboratories for performance of employee drug and alcohol use testing,⁴⁷ and to rescind the three specified changes in the revised employee policy manual. Further, with regard to the unlawful reduction of employee Frank Mendoza's rate of pay, I shall recommend that Respondent be ordered to restore his rate of pay to \$10 per hour, the rate at which he was paid prior to Respondent's discrimination against him in September 1990, and make him

⁴⁷ I am, of course, cognizant that, at least, seven bargaining unit employees were terminated for failing drug tests which were administered by Harrison & Associates Forensic Laboratories and that a reasonable argument could be made that, in the context of Respondent's unlawful conduct, any remedy should include reinstatement and backpay for the affected individuals. However, in the instant circumstances, I do not believe such a remedy is required. Thus, I note that neither counsel for the General Counsel nor the Charging Party has requested such a remedy. Further, there is no record evidence warranting the inference that any of the seven employees failed the drug tests performed by the above testing laboratory for any reason other than the presence of unlawful substances or that any would have passed a test administered by another testing laboratory. In these circumstances, it would not effectuate the policies or purposes of the Act to order reinstatement or backpay for said individuals, and I so conclude.

whole for his lost wages with such backpay computed as described in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as described in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Moreover, as to Respondent's patent surface bargaining herein, I shall recommend that Respondent be required to bargain in good faith with the Union and, if an agreement is reached, to embody the terms of that agreement in a signed written instrument. Since, in my view, Respondent has never really taken seriously its statutory obligation to bargain or honored the certification which the Board issued to the Union on August 20, 1990, I also shall recommend that the certification year be extended to run for a period of one year from the date that Respondent begins to bargain in good faith. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962). Finally, I shall recommend that Respondent be ordered to post the standard notice, advising its employees of its unfair labor practices and of the manner in which it shall remedy them.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁴⁸

ORDER

The Respondent, Sivalls, Inc., Odessa, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Engaging in bad-faith surface bargaining, with no intention of entering into any final or binding collective-bargaining agreement with the Union as the certified bargaining representative of the production and maintenance employees at its Odessa, Texas plant.

(b) Refusing to consider the inclusion of a dues-checkoff provision in any final collective-bargaining agreement with the Union.

(c) Insisting upon a broad management-rights clause and a no-strike provision in any final collective-bargaining agreement with the Union while, at the same time, refusing to consider the inclusion of any arbitration procedure.

(d) Refusing to engage in collective bargaining with the Union at its plant while, at the same time, refusing to share the cost of any meeting site away from the plant.

(e) Unreasonably delaying in the furnishing of information, necessary and relevant for collective bargaining, to the Union.

(f) Unilaterally, and without giving prior notice to the Union or affording it an opportunity to bargain, implementing changes in the bargaining unit employees' terms and conditions of employment, as set forth in the revised employee policy manual.

(g) Failing to give to the Union prior notice of its intent to contract with Harrison & Associates Forensic Laboratories and afford the Union an opportunity to bargain over the choice of said testing laboratory to conduct drug and alcohol tests of bargaining unit employees.

(h) Unilaterally, without giving prior notice to or affording the Union an opportunity to bargain, and in retaliation for their support for the Union in the representation election, im-

plementing changes in bargaining unit employees' terms and conditions of employment.

(i) Reducing the rates of pay of employees, after transferring them to different departments, in retaliation for their support for the Union.

(j) Interrogating employees about their own union activities and sympathies and those of their fellow employees.

(k) Warning employees that their organizing efforts and selecting the Union as their bargaining representative would be an exercise in futility.

(l) Threatening reprisals against employees for their organizing efforts and if they selected the Union as their bargaining representative.

(m) Warning employees that, if they selected the Union as their bargaining representative, contract bargaining would have to start from the ground up and could drag on for 15 to 17 years.

(n) Threatening employees with termination because of their support for the Union.

(o) Threatening employees with plant closure, loss of benefits, and other reprisals if the employees selected the Union as their bargaining representative.

(p) Soliciting grievances and "gripes" from employees in order to induce them to abandon their support for the Union.

(q) Threatening employees with termination for discussing their rates of pay or salary with fellow employees.

(r) Creating the impression of surveillance of employees' protected concerted activities.

(s) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain in good faith with the Union, as the bargaining representative of the production and maintenance employees at its Odessa, California plant, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an agreement is reached, embody the terms of that agreement in a signed written instrument.

(b) Restore bargaining unit employees' terms and conditions of employment as they existed prior to any of the unilateral changes which were implemented in 1990 after the said employees selected the Union as their bargaining representative and continue them in effect unless or until the Union states its desire not to bargain regarding any changes, a collective-bargaining agreement is reached, or an impasse is reached in bargaining.

(c) Restore employee Frank Mendoza's rate of pay to that which he received prior to his permanent transfer to the painting and sandblasting department and make him whole, in the manner set forth in the above remedy section of this decision, for any wages lost as a result of the discrimination against him.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

⁴⁸If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(e) Post at its facility in Odessa, Texas, copies of the attached notice marked "Appendix."⁴⁹ Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous

⁴⁹ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the certification of the Union issued hereby by the Board on August 20, 1990, be, and the same hereby is, extended for a period of 1 year commencing from the date on which Respondent begins to comply with the terms of this Order.